SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 391

RICHARD RICE, PETITIONER,

vs.

NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1944.

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[fols. 1-5]

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

Habeas Corpus. No. X-48 Civil

RICHARD (DICK) RICE, Petitioner,

versus

NEIL OLSON, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed July 30, 1943

To the Honorable Jefferson H. Broady, Judge of the above entitled Court:

Jurisdiction

The statutory provisions giving this Court jurisdiction to issue the writ requested is to be found in Chapter 29-2801 et seq., Chapters of the Compiled Statutes of Nebraska for 1929, and as far as here material declare that:

"If any person, except persons convicted of some crime or offense for which they stand committed, or persons committed for treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of [fol. 6] commitment, now is or shall be confined in any jail of this state, or shall be unlawfully deprived of his or her liberty, and shall make application, either by him or herself or by any person on his or her behalf, to any one of the judges of the district court, or to any county judge, and does at the same time produce to such judge a copy of the commitment or cause of detention of such person, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of habeas corpus, which writ shall be issued forthwith by the clerk of the district court, or by the county judge, as the case may require, under the seal of the court whereof the person allowing such writ is a judge directed to the proper officer, person or persons who detain such prisoner. "Compare, Smith v. O'Grady, 312 U. S. 329; Williams v. Olson, — Neb. —, 8 N. W. (2d) 830; Williams v. Olson, 317 U. S. —, 87 L. ed. —, 63 Sup. Ct. 431.

Showing

Your Petitioner in 1942, filed a similar petition in this court and was filed as No. Doc. W. Page 274, which case was dismissed on the grounds that it failed to state a cause of action, and on December 9, 1942, an appeal was allowed, filed in the Supreme Court of Nebraska, "General Number 31602," that court affirmed and dismissed said cause for failure of Appellant), (Petitioner) to comply with rule 3 requiring printed brief which rule has been abolished by the Nebraska Legislature May 20, 1943, your Petitioner filed a similar petition in the District Court of the United States for the District of Nebraska and was given cause No. 169 Civil and the case was dismissed in that it was not one of those "rare and exceptional cases requiring the intervention of the Federal Courts"; On May 24, 1943, the Supreme Court of the United States denied your Petitioner leave to file a petition for writ of habeas corpus; on October 5th, 1942, the District Court of Thurston County, Nebraska, denied your Petitioner relief by writ of error coram nobis, [fol. 7] for a correction of sentence. Regardless of the foregoing your petitioner is not bar-ed from having his case adjudicated on its merits at this time. Compare, Williams v. Olson, — Neb. —, 8 N. W. (2d) 830. See also, Ex Parte Williams et al., 317 U. S. —, 63 Sup. Ct. 431.

Your Petitioner Richard (Dick) Rice, respectfully shows to this Honorable Court as follows:

Your Petitioner is actually, unlawfully imprisoned and restrained of his liberty without due process of law, in that his Trial, Conviction and Commitment entered by the District Court of Thurston County, Nebraska, are unconstitutional and void; in that they are based on a swift, reckless sham and pretense of a trial; in violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, and your Petitioner is detained in the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, and is in the custody of Neil Olson, Warden of the aforesaid Penitentiary which is located within the jurisdiction of this Court, made under the following circumstances:

1. Your Petitioner a Winnebago Indian by birth a resident of Winnebago, Nebraska, a Ward of the Federal Government, on June 10th, 1935, was tried and convicted in

the District Court of Thurston County; Pender, Nebraska, on the information of the County Attorney "charging the offense of breaking and entering a building located in Thurston County, Nebraska, and carrying away property of the value of Thirty-five ($35.00) Dollars," and was sentenced to a term of one (1) years confinement in the men's Reformatory at Hawthrone, near Lincoln, Nebraska, served ten months (10), and was discharged from said penal institution April 10th, 1936, this statement is made for the sole purpose of showing the Court that his sentence hereinafter pronounced by the Court for a period of from one (1), to Seven (7), years confinement in the Nebraska State Penitentiary entered October 14, 1940, is illegal unconstitutional and void.

[fol. 8] 2. Thereafter on the 22nd day of May, 1940, the D. A. on his information charged your Petitioner with the offense of breaking and entering, in the words and figures as follows to-wit: "State of Nebraska, County of Thurston,) ss. In the District Court of the Eighth Judicial District of Nebraska, in and for —— County. The State of Nebraska, Plaintiff, vs. Joe Bigbear and Dick Rice, Defendant) Information #5173 Be It Remembered. That Alfred D. Raun, County Attorney in and for Thurston County, and in the Eighth Judicial District of the State of Nebraska, who prosecutes in the name and by the authority of the State of Nebraska, comes here in person into Court at this the February Term A. D. 1940, thereof, and for the State of Nebraska gives the Court to understand and be informed that Joe Bigbear and Dick Rice late of the county aforesaid, did, on the 17th day of May A. D. 1940, in the County of Thurston and the State of Nebraska aforesaid, then and there being, did then and there unlawfully, wilfully, maliciously, feloniously and forcefully break and enter into a certain dining hall in the Village of Winnebago in said county and state, then and there situate; that said dining hall is owned by the Winnebago Indian Mission of the Reform Church in America; with the intent of them the said Joe Bigbear and Dick Rice then and there to steal property of the value contained in said building, "Filed in District Court May 22, 1940; Moris Rasmussen, Clerk." State of Nebraska Thurston County) ss. I Moris Rasmussen Clerk of the District Court of said County, hereby certify that the above and foregoing is a true and correct

copy of the original now of record in this office. In testimony whereof I have hereuto set my hand and affixed the seal of said Court this 11th day of October A. D. 1942 Moris Rasmussen Clerk of the District Court.

Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Nebraska. Alfred D. Raun, County Attorney." (Omitting endorsements on back of Information.)

[fol. 9] 3. Thereafter, on the 14th day of October, 1940, your Petitioner was illegally, unlawfully without jurisdiction or authority of law arraigned in the District Court of Thurston County, Nebraska (hereinafter refer-ed to as the Trial Court) tried and convicted in less then twenty (20) minutes in the words and figures as follows to-wit:

"In The District Court of Thurston County, Nebraska.

The State of Nebraska, Plaintiff, vs. Dick Rice, Defendant.) No. 5173 *Journal Entry* Now on this 14th day of October, A. D. 1940, the same being one of the Judicial days of the October, A. D. 1940, term of said court: Defendant having waived a preliminary hearing in the county court and now being brought before the court for arraignment upon the information; this cause came on for hearing upon the information filed herein. The state appearing by said County Attorney and the Defendant appearing in person. The Defendant was thereupon arraigned upon the information filed herein for burglary and after the same was read to him in open court, and he was asked how he ple-d thereto, to which he replied, "Guilty".

The court thereupon read Section 28-538, C. S. 1929, Nebraska, and asked the Defendant, if after knowing what penalty would be inflicted upon him under his plea of guilty, he still desired to plead guilty, to which question of the court, he replied in the affirmative.

Whereupon the Defendant was asked if he had anything to say why judgment should not be passed upon him, the Defendant replied that he had nothing to say.

The statement of the County Attorney was then read.

The Court thereupon passed judgment and sentence of the court upon the defendant, as follows: It is the judgment and sentence of the Court that you be confined in the penitentiary of the State of Nebraska, at hard labor, no part of which shall be in solitary confinement and Sun-

days and holidays excepted as to hard labor, for a period of from one, (1), to seven, (7), years, and pay the costs of [fol. 10] prosecution, and that you be committed to the custody of the Sheriff of Thurston County, Nebraska, who will see that you are conveyed to the above institution for execution of this sentence, By the Court: Mark J. Ryan District Judge "Filed October 14, 1940; Moris Rasmussen, Clerk Dist. Court." State of Nebraska Thurston County) ss. I, Moris Rasmussen Clerk of the District Court of said County, hereby certify that the above and foregoing is a true and correct copy of the original now of record in this office. In testimony whereof I have hereunto set my hand and affixed the seal of said court this 9th day of October, 1942, Moris Rasmussen, Clerk of the District Court."

4. Upon the arraignment (set out in paragraph 3) the record bespeaks the truth that the Trial Court did not advise your Petitioner of his Constitutional rights to the assistance of Counsel and witnesses for his defense; nor the right to be charged and informed of the nature and cause of the accusation by indictment or presentment of a Grand Jury guaranteed by the Fourteenth, Fifth and Sixth Amendments of the Constitution of *of* the United States; nor the right to trial by jury guaranteed by Art. I, Sec. 6; Nebr. Const; nor did your Petitioner herein waive those constitutional rights either by action or words. It is well settled in this State that the rights afforded a person either by statute or the Constitution he cannot waive even by an agreement of the parties. Compare, Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007. See also, Ex Parte M'Clusky, 40 Fed. Rep. 71; Smith v. O'Grady, 312 U. S. 329.

In the instant case the record bespeaks the truth that your Petitioner was tried and convicted before a Court of incompetent jurisdiction, in that he was deprived of his Constitutional right to due process of law in this to-wit:

(a) In that no jurisdiction rested in the trial Court to take cognizance of the offense alleged in the information or the person of the accused, in that the alleged crime was committed on an *indian* Reservation Government property [fol. 11] without and beyond the Jurisdiction of the Trial Court. Compare, Miller v. McLaughlin, 118 Neb. 174; 224 N. W. 18; 281 U. S. 261.

(b) In that the Trial Court failed to complete the Court before placing your Petitioner upon his defense by an assignment of Counsel; empaneling of a trial jury. Compare, Smith v. O'Grady, 312 U. S. 329; Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007; See also Boyd v. O'Grady, 121 Fed. (2d) 146; Johnson v. Zerbst, 304 U. S. 458;

(c) In that the judgment of conviction is unconstitutional and void, in that the Trial Court imposed an indeterminate sentence rather than a flat or definite sentence as by law made and provided in that your Petitioner had previously served a sentence in a penal institution of the State of Nebraska at the mens Reformatory at Hawthorne, Nebraska. Compare, C. S. Neb. 1929, Chap. 29-2620, in violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States.

And furthermore my alleged accomplice was and had been previously convicted and served time for felonies and was given a stay on probation. Your Petitioner is an Indian of the Winnebago Tribe, located in the State of Nebraska, Thurston County, Nebraska, but no part of the State of Nebraska, exclusive under the jurisdiction of the Federal Government all without and beyond the jurisdiction of the Trial Court. Your Petitioner is Thirty (30) years of age, after being confined in the Nebraska State Penitentiary for 18 months he was informed that his proper remedy to correct the aforesaid mentioned deprivation of his liberty by a court without jurisdiction so to do, he employed counsel who advised him that his proper remedy was to file a Writ of error coram nobis with the Trial Court, petitioners Sister paid said Counsel a fee of Seventy-five ($75.00) Dollars to prepare and file said petition for writ of error coram nobis in the Trial Court which petition was on October 5, 1942, dismissed for want of prosecution on the part of Counsel. Your petitioner is ignorant of the s-ience of law, has never [fol. 12] studied law, and has no one to champion his cause of action only the assistance of a fellow inmate. Under all these circumstances he is entitled to be released upon his petition. Compare, Brown v. Mississippi, 297 U. S. 278; Boyd v. O'Grady, 121 Fed. (2d) 146. And further if the Trial Court had of assigned competent and serious counsel as by law made and provided under the provisions of Chap. 29-1803 C. S. Neb. 1929; Const. Amend., U. S., guaranteed by the Fourteenth Amendment of the Constitu-

tion of the United States, to guard and enforce those rights refer-ed to above, which was mandatory and given your petitioner a fair and impartial trial your Petitioner would of been able to convince the court that no jurisdiction rested in the Trial Court to take cognizance of the offense or the accused. Compare, Powell v. Alabama, 278 U. S. 45; Penn Mut. Life Ins. Co. v. Creighton Theatre Bldg. Co., et al. 54 Neb. 228, 74 N. W. at p. 584; Smith v. O'Grady, 312 U. S. 329. And further your Petitioner was deprived of his Constitutional right to be informed of the nature and cause of the accusation before being placed on his defense, in that he was deprived of the right to be served with a copy of the accusation and twenty-four (24) hours within which to examine the charge and prepare a defense, this allegation also is supported by the record. Compare, Zink v. State, 34 Neb. 37, 51 N. W. 294; State v. Robertson, 55 Neb. 41, 75 N. W. at p. 38; Smith v. O'Grady, 312 U. S. 329.

Your Petitioner alleges that by reason of the foregoing, that his Trial, Conviction and Commitment deprived him of his liberty without due process of law, in that they are unconstitutional and void, in that they were obtained by ordeal and mobocrary, in violation of the guarantee contained in the Fourteenth amendment of the Constitution of the United States, in this, to-wit:

(a) In that no jurisdiction rested in the Trial Court to proceed to judgment of conviction;

(b) In that your Petitioner was deprived of his Constitutional right to the assistance of Counsel and trial by [fols. 13-14] jury;

(d) In that he was illegally sentenced to an indeterminate sentence;

(e) In that the alleged crime was committed without and beyond the jurisdiction of the trial court.

And that he has been deprived and continues to be deprived of his liberty without due process of law, and have been deprived of his constitutional right to a judicial process by which he may extricate himself from false imprisonment.

Wherefore, your Petitioner having shown and alleged that his trial and conviction deprived him of his liberty without due process of law, as aforesaid, prays that a writ

of habeas corpus may issue; directed to Neil Olson, Respondent, to bring and have your Petitioner before this Court forthwith, together with the true cause of his detention, to the end that due inquiry may be had in the premises, and that this Court may proceed in a summary way to determine the facts and the legality of your Petitioner's imprisonment, restraint and detention, and thereupon to dispose of your Petitioner as law and justice may require, by releasing him from false imprisonment and that he go hence without day.

Richard Rice, Petitioner.

Duly sworn to by Richard Rice. Jurat omitted in printing.

[fol.15] In District Court of Lancaster County

[Title omitted]

Order Dismissing Petition—August 11, 1943

The application for a writ of Habeas corpus is denied and petition is hereby dismissed.

The petition, on its face, shows that a similar petition was filed and dismissed in this court in 1942; that an appeal therefrom was dismissed by the Supreme Court. The petition also states that a similar petition was filed in the United States District Court and which was also dismissed by that court. Thereafter, the Supreme Court of the United States denied leave to file an original application for a writ in that court.

No grounds is shown for the issuance of the writ prayed for. Therefore, the petition is dismissed and the application denied.

Dated at Lincoln, Nebraska, this 11 day of August, 1943.

By the Court: J. H. Broady, District Judge.

[fol. 16] In District Court of Lancaster County

[Title omitted]

Motion for New Trial—Filed August 17, 1943

Comes now the Petitioner in the above entitled and Numbered cause of action, the Movant herein, and respectfully prays the Court for an order to set aside the order

and judgment of the Court entered on August 11th, 1943, dismissing Petitioners petition for writ of habeas corpus, and to grant him a hearing and the assistance of Counsel and the right to prove his allegations set out in the petition for writ of habeas corpus originally filed in this Court and for cause states, the following good and sufficient reasons, to-wit: The Court erred:

I. In not holding that Petitioner's Trial, Conviction and Commitment entered by the District Court of Thurston County, Nebraska, deprived him of his liberty without due process of law, in that said Trial, Conviction and Commitment are unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, in this, towit:

(a) In that no jurisdiction rested in the Trial Court to proceed to judgment of Conviction;

(b) In that your Petitioner was deprived of his Constitutional right to be informed of the nature and cause of the accusation of which he was convicted as by law made and provided;

(c) In that your Petitioner the Movant herein was deprived of the Constitutional right to the assistance of Counsel and trial to jury;

[fols. 17-21] (d) In that your Petitioner was illegally sentenced to an indeterminate sentence.

(e) In that the alleged crime was committed without and beyond the jurisdiction of the Trial Court;

And that he has been deprived and continues to be deprived of his liberty without due process of law, and has been deprived of his Constitutional right to a judicial process by which he may extricate himself from false imprisonment, in violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States.

Wherefore, Your Petitioner respectfully prays that the judgment and order of the Court entered August 11th, 1943, dismissing the petition for writ of habeas corpus be set aside and held for naught and a new trial awarded, and petitioner discharged as law and justice require.

Richard Rice, Richard (Dick) Rice.

[fols. 22-36] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—Aug. 26, 1943

This cause now comes on to be heard on motion of petitioner to set aside the judgment of the Court heretofore rendered and entered herein and for a new trial of this case, and is submitted to the Court, on due consideration whereof, the Court doth overrule said motion.

[fols. 37-38] IN SUPREME COURT OF NEBRASKA

No. 31735

In re Application for Writ of Habeas Corpus. RICHARD (DICK) RICE, Petitioner, Appellant,

v.

NEIL OLSON, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, Respondent, Appellee

Appeal from the District Court of Lancaster County

JUDGMENT—April 7, 1944

This cause coming on to be heard upon appeal from the district court of Lancaster county, was submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed; that appellee recover of and from appellant his costs herein expended, taxed at $——; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Robert G. Simmons, Chief Justice.

[fol. 39] IN SUPREME COURT OF NEBRASKA

31735

In re Application, RICE,

v.

OLSON

1. The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him.

2. When a defendant enters a plea of guilty, he thereby waives all defenses, other than those that are jurisdictional.

3. The acceptance of a plea of guilty authorizes the imposition of the legal sentence for the crime properly charged in the information.

OPINION—Filed April 7, 1944

[fol. 40] Heard Before Simmons, C. J., Paine, Carter, Yeager, Chappell and Wenke, JJ.

PAINE, J.:

This matter comes before this court upon a petition filed by Richard (Dick) Rice in the district court for Lancaster county, praying that a writ of habeas corpus may issue. This application was denied by the district court.

On July 30, 1943, a petition was filed in the district court for Lancaster county, which sets out that the petitioner is a Winnebago Indian by birth, and a resident of Winnebago, Nebraska, and is a ward of the federal government; that on June 10, 1935, he was tried and convicted in the district court for Thurston county at Pender on an information of the county attorney charging him with the offense of breaking and entering a building located in Thurston county, and carrying away property of the value of $35, and was sentenced to a term of one year in the men's reformatory near Lincoln, Nebraska, and served ten months, and was discharged on April 10, 1936.

This petition then charges that thereafter on May 22, 1940, an information was filed, charging petitioner and one

Joe Bigbear with forcibly breaking and entering into a certain dining hall in the village of Winnebago on May 17, 1940, which dining hall is owned by the Winnebago Indian Mission [fol. 41] of the Reform Church in America, with the intent to steal property of value contained in said building, and on October 14, 1940, defendant waived preliminary hearing in the county court and was arraigned upon information filed for burglary in the district court and pleaded guilty thereto; that thereupon section 28-538, Comp. St. 1929, was read to him, and he was then asked if, after knowing what penalty could be inflicted upon him under his plea of guilty, he still desired to plead guilty, to which question of the court he replied in the affirmative, and having stated that he had nothing to say before sentence was pronounced he was thereupon sentenced to hard labor in the penitentiary for a period of one to seven years by the district court.

It is charged that the trial court did not advise the petitioner of his constitutional rights to have counsel and witnesses, or to be charged and informed against by indictment of a grand jury, which is guaranteed under the Fourteenth, the Fifth, and the Sixth Amendments to the Constitution of the United States, nor of his right to a trial by jury, guaranteed by section 6, art. I of the Nebraska Constitution, and that said petitioner did not waive those constitutional rights either by action or words, and that such rights cannot be waived by agreement of the parties, and it is charged that he was convicted by a court of competent jurisdiction and deprived of his constitutional right of due process of law; that no jurisdiction rested in the [fol. 42] trial court, or over the person of the accused, because the alleged crime was committed on an Indian reservation and without and beyond the jurisdiction of the trial court.

It is also charged that judgment of conviction is unconstitutional and void in that the trial court imposed an indeterminate sentence of from one to seven years instead of a flat or definite sentence, as by law required, in that petitioner had previouly served a sentence in a penal institution at the men's reformatory. See Comp. St. 1929, sec. 29-2620.

It is further charged in said petition that the petitioner is an Indian of the Winnebago tribe, and the same is under

the exclusive jurisdiction of the federal government, and without the jurisdiction of the trial court.

The petitioner further charges that, after being confined in the Nebraska state penitentiary for 18 months he employed counsel, who advised him that his proper remedy was to file a writ of error *coram nobis* with the trial court, and petitioner's sister paid said counsel $75 to prepare said petition, which petition was dismissed October 5, 1942.

It is further charged that under section 29-1803, Comp. St. 1929, it was mandatory upon the district court to assign counsel to guard and enforce rights guaranteed under the Fourteenth Amendment to the United States Constitution. [fol. 43] It is further charged that he was deprived of his right to be served with a copy of the information and given 24 hours thereafter within which he might examine the charge and prepare a defense.

Because of these allegations, the petitioner prays that a writ of habeas corpus may issue, directing Neil Olson, warden of the penitentiary, to bring the petitioner before the court to determine the facts and legality of the petitioner's imprisonment and dispose of the petitioner as law and justice may require, and release him from such false imprisonment, and that he may go hence without day.

The federal Constitution does provide, in article V of the Amendments, as charged in the petition, that no person shall be held to answer for a crime such as was charged in this case unless upon an indictment of a grand jury, but section 10, art. I of the Constitution of Nebraska provides that the legislature may provide for holding such persons upon the information of the public prosecutor, and section 26-901, Comp. St. 1929, provides that when a county attorney has sufficient evidence he is authorized to file such proper complaint as was done in this case, in strict accordance with the Nebraska Constitution and laws.

It is also claimed in the petition that the petitioner is a Winnebago Indian and is under the exclusive jurisdiction of [fol. 44] the federal government, and without the jurisdiction of the district court of Nebraska. However, chapter 15, title 18, U. S. C. A., sec. 548, of the federal Penal Code, provides generally that all Indians committing a crime, either within or without an Indian reservation within the boundaries of a state, shall be subject to the same laws, and tried

in the same courts, and subject to the same penalties as all other persons.

It is contended that it was mandatory for the district court to assign counsel to assist the defendant. In Alexander v. O'Grady, 137 Neb. 645, 290 N. W. 718, and Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82, this court has adopted the rule to be: "The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him." 16 C. J. 821.

"It is not necessary that there be a formal waiver; and a waiver will ordinarily be implied where accused appears without counsel and fails to request that counsel be assigned to him, particularly where accused voluntarily pleads guilty." 23 C. J. S. 314, sec. 979.

Judge Parker, of the Fourth Circuit Court of Appeals, said: "We do not think that the plea of guilty was vitiated or that the sentence imposed was avoided by reason of the fact that appellant was not represented by counsel in the District Court. Where an accused personally enters a plea [fol. 45] of guilty to a crime whereof he stands charged, and does so understandingly, freely and voluntarily without asking the assistance of counsel, a waiver of the right to be represented by counsel may fairly be inferred. Logan v. Johnston, D. C., 28 F. Supp. 98; Erwin v. Sanford, D. C. 27 F. Supp. 892." Cundiff v. Nicholson, 107 Fed. 2d 162.

It is charged that petitioner was deprived of his right to be served with a copy of the accusation and given 24 hours within which to examine the charge and prepare his defense. It is contended that this is a substantial right which it is error to deny. The case of Zink v. State, 34 Neb. 27, 51 N. W. 294, is cited, but in that case Zink did not plead guilty, while in the instant case the defendant did enter such a plea.

"A defendant, by pleading guilty, waives all defenses other than that the indictment charges no offense." 14 Am. Jur. 952, sec. 272.

"A plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order, the effect of which is to authorize the imposition of the sentence prescribed by law on a verdict of guilty of

the crime sufficiently charged in the indictment or information." 14 Am. Jur. 952, sec. 272.

"A plea of guilty admits all facts sufficiently pleaded, [fol. 46] confesses the indictment or information to be wholly true, with respect to each and every allegation, operates as a waiver of any defense, and of the constitutional right to a trial by jury, and with it, of course, the constitutional guarantees with respect to the conduct of criminal prosecutions." 2 Standard Ency. of Procedure, 895.

"'A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement.' 16 C. J. 403." State ex rel. Gossett v. O'Grady, 137 Neb. 824, 291 N. W. 497.

In the case at bar, as the record shows affirmatively that the defendant had pleaded guilty, this absolutely waived this and all other preliminary steps in connection therewith, so this allegation has no merit.

In this petition for habeas corpus, it is charged that the sentence is unconstitutional and void because it is an indeterminate sentence of one to seven years after he had served a previous sentence on a similar charge.

The present record does disclose his prior sentence of one year to the state reformatory for a felony, and it appears that the legislature did not contemplate that a second indeterminate sentence should be given. The trial court, either through inadvertence or misapprehension, appears to have given a different sentence, that is, a lighter sentence than might have been given. This frequently [fols. 47-54] occurs when an entire stranger is arrested in our state and claims it is his first felony and receives an indeterminate sentence as a first offender, but when it appears somewhat later that he was actually a second offender, that does not make the sentence given illegal or void. Doubtless the board of paroles and pardons can consider such facts in later consideration of the exact time of his discharge.

In McElhaney v. Fenton, 115 Neb. 299, 212 N. W. 612, the trial court gave sentence of not less than three years nor more than twenty years, while the statute provided that the maximum sentence should not be more than ten years. It was held that, while the sentence was erroneous, it was not void, and it would stand for the term that the law au-

thorized. It was held that on an application for a writ of habeas corpus, errors and irregularities, not jurisdictional, will not be considered.

In the case of Hulbert v. Fenton, 115 Neb. 818, 215 N. W. 104, it was said that habeas corpus is a collateral, and not a direct, proceeding as a means of an attack upon a judgment and sentence regular upon its face, and no extrinsic evidence is admissible in a habeas corpus proceeding to show its invalidity. See In re Evans, 173 Mich. 25, 138 N. W. 276.

The judgment of the trial court was right, and it is hereby affirmed.

Affirmed.

[fols. 55-68] In Supreme Court of Nebraska

[Title omitted]

Order Denying Rehearing—June 9, 1944

This cause coming on to be heard upon motion of appellant for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

Robert G. Simmons, Chief Justice.

[fol. 69] Supreme Court of the United States

Order Granting Motion for Leave to Proceed in Forma Pauperis—October 16, 1944

On consideration of the motion for leave to proceed herein in forma pauperis,

It is ordered by this Court that the said motion be, and the same is hereby granted.

[fol. 70] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 16, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of Nebraska is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: In forma pauperis. Enter petitioner pro se. File No. 48,844. Nebraska, Supreme Court. Term No. 391. Richard Rice, Petitioner, vs. Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska. Petition for a writ of certiorari and exhibit thereto. Filed August 24, 1944. Term No. 391 O. T. 1944.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 391

RICHARD RICE,

Petitioner,

vs.

NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

(S.) RICHARD RICE,
in persona.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 391

RICHARD RICE,

Petitioner,

vs.

NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Richard Rice, respectfully prays for a Writ of Certiorari herein to review a certain final judgment of the Supreme Court of Nebraska, being the highest court of said State in which a decision could be had, the original opinion and decision of said court having been rendered on April 7, 1944 (R. 11-16), and a motion for rehearing having been filed within the time provided by the law of said State was, after being entertained and considered by said court, overruled without an opinion on June 9, 1944 (R. 16).

Summary Statement of Matter Involved

I. In the case at bar, petitioner on August 11th, 1943, filed his petition for writ of habeas corpus in the District Court of Lancaster County, Nebraska, contending, alleging and showing the court that:

> "His trial, conviction and commitment, entered by the District Court of Thurston County, Nebraska (which commitment he is now undergoing) deprived him of his liberty without due process of law, in that they are unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, in this, to-wit: • • •. In the instant case the record bespeaks the truth, that your Petitioner was triad and convicted before a court of incompetent jurisdiction, in that he was deprived of his Constitutional right to due process of law in this to-wit:
>
> (a) In that no jurisdiction rested in the trial court to take cognizance of the offense alleged in the information or the person of the accused, in that the alleged crime was committed on an Indian Reservation Government property without and beyond the jurisdiction of the Trial Court. • • •.
>
> (b) In that the Trial Court failed to complete the Court before placing your Petitioner upon his defense by an assignment of Counsel; empaneling of a trial jury. • • •.
>
> (c) In that the judgment of conviction is unconstitutional and void, in that the Trial Court imposed an indeterminate sentence rather than a flat or definite sentence as by law made and provided in that your petitioner had previously served a sentence in a penal institution of the State of Nebraska at the mens Reformatory at Hawthorne, Nebraska. • • •.
>
> And furthermore • • •. Your Petitioner is an Indian of the Winnebago Tribe, located in the State of

Nebraska, Thurston County, Nebraska, but no part of the State of Nebraska, exclusive under the jurisdiction of the Federal Government all without and beyond the jurisdiction of the Trial Court. Your Petitioner is Thirty (30) years of age, after being confined in the Nebraska State Penitentiary for 18 months he was informed that his proper remedy to correct the aforesaid mentioned deprivation of his liberty by a court without jurisdiction so to do, he employed counsel who advised him that his proper remedy was to file a Writ of error coram nobis with the Trial Court, petitioners Sister paid said counsel a fee of Seventy-five ($75.00) Dollars to prepare and file said petition for writ of error coram nobis in the Trial Court which petition was on October 5, 1942, dismissed for want of prosecution on the part of Counsel. Your petitioner is ignorant of the science of law, has never studdied law, and has no one to champion his cause of action only the assistance of a fellow inmate. Under all these circumstances he is entitled to be released upon his petition. * * *." (R. 1-8).

A copy of the petition was duly served and filed in rule time joining the issues.

On the same day the petition was filed the court entertained the Federal contention raised and ordered the "application for a Writ of Habeas corpus is denied and petition is hereby dismissed. * * *. No grounds is shown for the issuance of the writ prayed for. * * *." (R. 8).

In due time petitioner, presented to the court for consideration a motion for new trial on the grounds that the court erred in not holding that petitioners trial and conviction and commitment entered by the District Court of Thurston County, Nebraska, deprived him of his liberty without due process of law, in that said Trial, Conviction and Commitment are unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation of

the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, the court entertained the Federal contention raised (R. 8-9), and overruled the motion in all things on August 26, 1943, without a hearing.

Petitioner timely presented, in the manner and form provided by law, an appeal from the judgment aforesaid to the Supreme Court of Nebraska, which court April 7, 1944, after having considered said cause on briefs without argument, entered its judgment in all things affirming the judgment and order of the District Court denying and dismissing the petition for writ of habeas corpus ex parte, on the grounds that petitioner's plea of guilty stood as a jurisdictional bar to test the judgment of conviction entered by the District Court of Thurston County, Nebraska, entered in violation of the procedural guaranties contained in the Fourteenth Amendment of the Constitution of the United States (R. 10-16). Thereafter, your petitioner within the time and in the manner required by law, filed his Motion for Rehearing and brief in support thereof in the Supreme Court of Nebraska, and such motion was in all things overruled by the said Supreme Court of Nebraska on June 9, 1944 (R. 16).

Jurisdiction

The Supreme Court of Nebraska is the court of last resort in all cases civil or criminal prosecuted under the laws of Nebraska, and is the highest court of said State in which a decision of this cause could be had; that it is constituted the court of last resort and the highest of civil and criminal jurisdiction in a cause of this nature (Habeas Corpus) by the provisions of Article 5, Section 2, of the Constitution of the State of Nebraska, wherein it provides that:

"The Supreme Court shall have jurisdiction in all cases relating to the revenue, civil cases in which the

state is a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law.".

And the judgment of the Supreme Court of Nebraska upon overruling petitioner's motion for rehearing is final and conclusive unless it be reversed by the Supreme Court of the United States.

The judgment of the Supreme Court of Nebraska is a final judgment within the purview of section 344 (b) Title 28 U. S. C. A. (section 237 (b) of the Judicial Code, amended), reading as follows:

> "Or where any title, right, privilege or immunity is especially set up or claimed by either party under the constitution * * * and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied * * *"

And paragraph 5(a) Rule 38, of the Rules of the Supreme Court, wherein it provides that:

> "Where a state court has decided a federal question of substance not heretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The claim of constitutional rights was also specifically raised by the petitioner, and considered by the Supreme Court of Nebraska, in the form of an assignment of errors appearing in your petitioner's brief submitted for showing. At no time during the entire proceedings in the courts of Nebraska has the respondent made a single denial of the federal contention raised by your petitioner (R. 1-10). The Supreme Court of Nebraska in its opinion after its judgment and order of affirmance of the judgment and order of the District Court of Lancaster of Lancaster

County, Nebraska, dismissing and denying the petition ex-parte, held that; I quote in substance:

> "Petitioner's plea of guilty stood as a jurisdictional bar to his collaterall attackt on a judgment of conviction rendered in violation of the procedural guaranties protected against state invasion throuth the Fourtenth Amendment of the Constitution of the United States" (R. 14-15).

Questions Presented

1. Does a plea of guilty to an information of a county attorney charging an alleged offense of which the court has no jurisdiction of, stand as a jurisdictional bar, preventing your petitioner from setting up as here a collateral attackt on a judgment of conviction entered in express violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States? It is respectfully submitted that the Supreme Court of the United States answered this question in the negative. Compare, *Smith* v. *O'Grady*, 312 U. S. 329; Ex parte kuwitzky, 135 Neb. 466, 282 N. W. 396.

2. Did petitioner's trial, conviction and commitment entered by the District Court of Thurston County, Nebraska, deprive him of his liberty without due process of law, when petitioner, an ignorant Indian, a ward of the Federal Government, failed to demand the assistance of counsel and trial by jury before being tried and convicted, in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States? It is respectfully submitted that this the Supreme Court of the United States has answered that question in the negative. Compare, *Johnson* v. *Zerbst*, 304 U. S. 458. See also, Chap. 29-1803 C. S. Neb. 1929; *Michaelson* v. *Beemer*, 72 Neb. 761, 101 N. W. 1007.

3. Does a plea of guilty stand as a jurisdictional bar, to a collateral attackt on a judgment of conviction which deprived petitioner of his liberty without due process of law, service of a copy of the accusation (information or indictment) and twenty-four (24) hours to examine said charge, consult with counsel and prepare a defense, before being placed on trial and convicted, in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States? It is respectfully submitted that the Supreme Court of the United States answered that question in the negative. Compare, *Ex parte Henry Hawk*, 321 U. S. 114, and the authorities there cited. See also, *Zink* v. *State*, 34 Neb. 37, 51 N. W. 294-5.

4. Did the District Court of Thurston County, Nebraska, have jurisdiction to accept a plea of guilty and pronounce judgment of conviction for an offense allegedly committed on an Indian Reservation in the City of Winnebago, Nebraska? It is respectfully submitted that the Supreme Court of the United States answered that question in the negative. Compare, *Jerome* v. *United States*, 318 U. S. 101. See also, Title 18 U. S. C. Section 451.

5. Did petitioner's trial, conviction and commitment entered by the District Court of Thurston County, Nebraska, deprive him of his liberty without due process of law, and the right to a flat or definite sentence rather than a indeterminate sentence, in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States? It is respectfully submitted that the Supreme Court of the United States answered that question in the affirmative. Compare, *Graham* v. *Weeks*, 138 U. S. —. See also, 33 C. J. p. 1064; *State ex rel. Lang* v. *Civil Court*

of Milwaukee County, 280 N. W. at p. 349. See also, Chap. 29-2620 C. S. Neb. 1929.

Reasons Relied Upon for the Allowance of the Petition for Writ of Certiorari

1. The order, judgment and opinion of the Supreme Court of Nebraska (R. 10-16) in the case at bar involves an important question of federal protected rights secured and guaranteed by the Fourteenth Amendment of the Constitution of the United States which that court failed to protect, and showed a flagrant disrespect for this Courts mandates.

The Supreme Court of Nebraska held that in a trial for the commission of a non-capital felony, the penality was imprisonment not exceeding ten (10) years, due process of law did not absolutely require that the trial court have jurisdiction of the place and subject matter within the meaning of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, in that a plea of guilty stood as a jurisdictional bar to a collateral attackt as in the case at bar. Such a holding is in direct conflict with the decisions of this court, particularly the case of *Jerome* v. *United States*, 318 U. S. 101, and is in conflict with the procedural guaranteed by the Fourteenth Amendment of the Constitution of the United States.

2. The Supreme Court of Nebraska held that in a trial for the commission of a non-capital felony, the penalty was imprisonemnt not exceeding ten (10) years, due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States did not absolutely require that the accused be represented by counsel, in that a plea of guilty stood as a jurisdictional bar to thereafter attackt the jurisdiction of the trial court to pronounce judg-

ment of conviction. Such a holding is in direct conflict with the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, and the decisions of this Court, particularly the case of *Smith* v. *O'Grady*, 312 U. S. 329, and the authorities there cited; See also *Ex parte Henry Hawk*, 321 U. S. 114.

3. The Supreme Court of Nebraska held that in a trial for the commission of a non-capital felony the penalty was imprisonment not exceeding ten (10) years, due process of law did not absolutely require that the accused be served with a copy of the accusation (information or indictment) and twenty-four (24) hours to examine the charge, consult with counsel and prepare a defense, within the meaning of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States. Such a holding is in direct conflict with the decisions of this Court, particularly the case of *Ex parte Henry Hawk*, 321 U. S. 114, and the authorities there cited. See also *Zink* v. *State*, 134 Neb. 137, 51 N. W. 294.

4. The Supreme Court of Nebraska held that due process of law did not absolutely require that the accused be sentenced to a flat sentence as required by the laws of Nebraska, within the meaning of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States. Such a holding is in direct conflict with the decisions of this Court, particularly the cases of *Hans Neilsen, Petitioner*, 131 U. S. 176; *Smith* v. *O'Grady*, 312 U. S. 329, and Chapter 29-2620 C. S. Neb. 1929.

5. A plea of guilty in and of itself is not a waiver to thereafter collateral attackt a judgment of conviction pronounced by a state court in violation of the procedural

guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, this court has very recently condemned the Supreme Court of Nebraska for this practice (*Smith* v. *O'Grady*, supra). Such a holding has been condemned by every court in the land, even the Supreme Court of Nebraska, unless said members of the said court have a personal bias and prejudice against the Petitioner. Compare, *Ex parte Kuwitzky*, 135 Neb. 466, 282 N. W. 396; *Ex parte Resler*, 115 Neb. 335, 212 N. W. 765; *In re Betts*, 36 Neb. 285, 54 N. W. 524; *In re Havelik*, 45 Neb. 747, 64 N. W. 234. See also, *Smith* v. *O'Grady*, 312 U. S. 329; *Boyd* v. *O'Grady*, 121 Fed. (2d) 146; *Dyhre* v. *Hudspeth*, 106 Fed. (2d) 286. Cf. *Darling* v. *Fenton*, 120 Neb. 829, 235 N. W. 582; *Rice* v. *Olson*, 13 Nebraska Supreme Court Journal 227, herewith submitted marked Exhibit "A".

Protection against such a flagrant violation of federal protected life and liberty is certainly "of the very essence of a scheme of ordered liberty" calling for this Court invocation of supervision, as in the case of *Smith* v. *O'Grady*, 312 U. S. 329; *Ex parte Henry Hawk*, 321 U. S. 114; *Palko* v. *Connecticut*, 302 U. S. 319, 325; *Chambers* v. *Florida*, 309 U. S. 227; *Bryant* v. *Zimmerman*, 278 U. S. 63.

In support of the foregoing grounds for the issuance of the writ, your petitioner submits the accompanying brief showing more fully the precise facts and arguments applicable thereto.

Wherefore, your petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the order, judgment and opinion of the Supreme Court of Nebraska, that its judgment be reversed, and that the prayer for a petition for writ of habeas corpus be sustained.

(S.) RICHARD RICE,
in persona.

STATE OF NEBRASKA,
Lancaster County, ss:

Personally before me, the undersigned officer authorized by law to administer oaths, appeared Richard Rice, who being first duly sworn, deposes on oath and says that he has read the foregoing petition for writ of certiorari, that he knows the contents thereof, that the statements therein made are true, except as to such matters as are stated upon information and belief, and these he verily believes to be true, to the best of his knowledge, information and belief.

(S.) RICHARD RICE,

Subscribed in my presence and sworn to before me, this 10 day of August, 1944. L. M. Larsen, Notary Public in and for Lancaster County, Nebraska. My commission expires November 19, 1949. (Seal.)

BRIEF IN SUPPORT OF PETITION

Opinion Below

There was no reported opinion of the District Court of Lancaster County, Nebraska, the order and judgment of dismissal is to be found (R. 8). The order, judgment and opinion of the Supreme Court of Nebraska is reported (R. 10, 11, 16) 13 N. S. C. J. 227, Exhibit "A"), 14 N. W. (2d) 850.

Jurisdiction

The judgment of the Supreme Court of Nebraska sought to be reviewed was entered on April 7, 1944. Jurisdiction to issue the writ requested is found in the provisions of section 344(b) Title 28 U. S. C. A. (section 237 of the Judicial Code, amended); And paragraph 5(a) Rule 38, of the Supreme Court of the United States effective February 27, 1939, and are set out in the petition.

A Summary Statement of the Case Will Be Found in the Petition

A summary statement of the case will be found in the petition and there will be no attempt in this argument to burden the learned court with a reiteration thereof.

Specification of Errors

Petitioner contends that the Supreme Court of Nebraska erred:

1. In holding that petitioner's plea of guilty was a waiver of his constitutional rights to attackt the jurisdiction of the District Court of Thurston County, Nebraska, by the process of habeas corpus.

2. In holding that where the accused was tried for a non-capital felony over which the trial court had no jurisdiction

on an Indian reservation, without the assistance of counsel and trial by jury, his plea of guilty stood as a jurisdictional bar to put up the claim in a habeas corpus proceedings that his trial, conviction and commitment to the Nebraska State Penitentiary for not less than 1 nor more than 7 years, deprived him of his liberty without due process of law in violation of the procedural guaranties contained in the Fourteenth Amendment of the Constitution of the United States, when he was ignorant of his legal rights and legal skill, petitioner was not entitled to be released upon his petition for writ of habeas corpus.

3. In not holding that petitioner's judgment of sentence deprived him of his liberty without due process of law a necessary requisite to jurisdiction, in that he was sentenced to an indeterminate sentence rather than a flat or definite sentence as required by law in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, and not releasing petitioner upon his petition for writ of habeas corpus.

4. In holding that the judgment and order of the District Court of Lancaster County, Nebraska, dismissing and denying the petition for writ of habeas corpus sought by petitioner was right.

5. In not reversing the judgment of the District Court of Lancaster County, Nebraska, and releasing petitioner on his writ of habeas corpus.

6. In not holding that petitioner's trial, conviction and commitment originally entered by the District Court of Thurston County, Nebraska, was unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Con-

stitution of the United States, and not releasing petitioner on his petition for writ of habeas corpus.

7. In holding that petitioner's plea of guilty constituted a waiver of his constitutional rights to be served with a copy of the accusation within the meaning of the due process secured and guaranteed by the Fourteenth Amendment of the Constitution of the United States, and not releasing petitioner upon his petition for writ of habeas corpus.

Argument

I

Upon the Unimpeachable and Disputed Evidence of Facts. Petitioner's Trial, Conviction and Commitment Entered by the District Court of Thurston County, Nebraska, Deprived Him of His Liberty without Due Process of Law, in that Said Trial, Conviction and Commitment Were Unconstitutional and Void, in that Said Trial, Conviction and Commitment Were Obtained by Ordeal and Mobocracy, in Violation of the Procedural Guaranties Protected Against State Invasion Through the Fourteenth Amendment of the Constitution of the United States.

The Fourteenth Amendment of the Constitution of the United States declares that:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, * * *, without due process of law; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS" (Capitals supplied).

Whatever might have been the law in the State of Nebraska prior to the following decisions it was by those decisions established that "jurisdiction of the place and subject matter was a necessary requisite to due process of law" within the meaning of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, supra. Compare, *Jerome* v. *United States*, 118 U. S. 101; *Miller* v. *McLaughlin*, 118 Neb. 174, 224 N. W. 18; 281, U. S. 261.

"Service of the accusation and twenty-four (24) hours to examine the charge, consult with counsel and prepare a defense and trial by jury are a necessary requisite to due process of law, within the meaning of the procedural guaranties contained in the Fourteenth Amendment of the Constitution of the United States," supra. Compare, *Ex parte Henry Hawk*, 321 U. S. 114; *Smith* v. *O'Grady*, 312 U. S. 329; see also *Zink* v. *State*, 34 Neb. 37, 51 N. W. 294.

The issue of whether petitioner's trial, conviction and commitment entered by the District Court of Thurston County, Nebraska (R. 4-5), deprived him of his liberty without due process of law, is therefore presented under the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, supra. And upon the facts of the instant case it must be held, it is submitted that his trial, conviction and commitment aforesaid, deprived him of his liberty without due process of law secured and guaranteed by the by the Fourteenth Amendment of the Constitution of the United States, supra.

The defendant-petitioner a Ward of the Federal Government an Indian by birth of the Winnebago Tribe of Nebraska, ignorant of the science of law and his legal rights, 31 years of age, was arraigned in the trial court, supra, and through his ignorance entered a plea of guilty to an information of an unscruplous Public Prosecutor charging

the offense of breaking and entering a certain Church building located on the Winnebago Indian Reservation of Nebraska, over which Reservation (lands) he had no jurisdiction to inform of offenses committed thereon (R. 3).

Thereafter on October 14, 1940, your petitioner was arraigned in the trial court and through his ignorance and without the advice of counsel pleaded "Guilty" to the charge laid in the information referred to above, and forthwith the Trial Court read Section 28-538 C. S. Neb. 1929, informing your petitioner what penalty could be imposed on plea of guilty, and asked defendant-petitioner if he had anything to say why judgment should not be passed upon him, the defendant-petitioner replied that he had nothing to say, the court thereupon passed judgment (R. 4).

In his petition for writ of habeas corpus, petitioner, contended, showed and alleged, that:

> Among other things, "that his Trial, Conviction and Commitment entered by the District Court of Thurston County, Nebraska, deprived him of his liberty without due process of law, in that they are unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States" (R. 7).

And:

> "(a) In that no jurisdiction rested in the Trial Court to take cognizance of the offense alleged in the information or the person of the accused, in that the alleged crime was committed on an Indian Reservation Government property without and beyond the jurisdiction of the Trial Court" citing auth.
>
> "(b) In that the Trial Court failed to complete the Court before placing your Petitioner upon his defense by an assignment of Counsel, empaneling of a trial jury." citing auth.

"(d) In that he was illegally sentenced to an indeterminate sentence" (R. 7).

The Respondent's Counsel the Learned Walter R. Johnson, Attorney General for Nebraska, filed his reply brief relying solely for an affirmance of the lower courts judgment of dismissing and denying the writ on that petitioner's plea of "GUILTY" constituted a jurisdictional bar to a collateral attackt on a judgment of conviction rendered in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, supra. And the Supreme Court of Nebraska after considering the federal contention raised affirmed the judgment of the district court dismissing and denying the petition in the words and figures as follows to-wit:

> "This cause coming on to be heard upon appeal from the district court of Lancaster County, was submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed; that appellee recover of and from appellant his costs herein expended, taxed at $; for all of which execution is hereby awarded, and that a mandate issue accordingly. Robert G. Simons Chief Justice" (R. 10).

The Supreme Court of Nebraska in its opinion so flagrantly showed disrespect for this Court's mandate when it said:

> "the petitioner is a Winnebago Indian by birth, and a resident of Winnebago, Nebraska, and is a ward of the federal government; that on June 10, 1935, he was tried and convicted in the district court for Thurston county at Pender on an information of the county attorney charging him with the offense of breaking and entering

a building located in Thurston county, and carrying away property of the value of $35, and was sentenced to a term of one year in the men's reformatory near Lincoln, Nebraska, and served ten months, and was discharged on April 10, 1936."

"This petition then charges that thereafter on May 22, 1940, an information was filed, charging petitioner and one Joe Bigbear with forcibly breaking and entering into a certain dining hall in the village of Winnebago on May 17, 1940, which dining hall is owned by the Winnebago Indian Mission of the Reform Church in America, with the intent to steal property of value contained in said building, and on October 14, 1940, defendant waived preliminary hearing in the county court and was arraigned upon information filed for burglary in the district court and pleaded guilty thereto; * * *."

"It is charged that the trial court did not advise the petitioner of his constitutional rights to have counsel and witnesses, or to be charged and informed against by indictment of a grand jury, which is guaranteed under the Fourteenth, the fifth, and the Sixth Amendments to the Constitution of the United States, nor of his right to a trial by jury, guaranteed by section 6, art. 1 of the Nebraska Constitution, and that said petitioner did not waive those constitutional rights either by action or words, and that such rights cannot be waived by agreement of the parties, and it is charged that he was convicted by a court of *in*competent jurisdiction and deprived of his constitutional right of due process of law; that no jurisdiction rested in the trial court, or over the person of the accused, because the alleged crime was committed on an Indian reservation and without and beyond the jurisdiction of the trial court." (Note *in* italicized supplied to conform to true facts.)

"It is also charged that judgment of conviction is unconstitutional and void in that the trial court imposed an indeterminate sentence of from one to seven

years instead of a flat or definite sentence, as by law required, in that petitioner had previously served a sentence in a penal institution at the men's reformatory. See Comp. St. 1929, sec. 29-2620."

"It is further charged in said petition that the petitioner is an Indian of the Winnebago tribe, and the same is under the exclusive jurisdiction of the federal government, and without the jurisdiction of the trial court."

"The petitioner further charges that, after being confined in the Nebraska state penitentiary for 18 months he employed counsel, who advised him that his proper remedy was to file a writ of error *coram nobis* with the trial court, and petitioner's sister paid said counsel $75 to prepare said petition, which petition was dismissed October 5, 1942."

"It is further charged that under section 29-1803, Comp. St. 1929, it was mandatory upon the district court to assign counsel to guard and enforce rights guaranteed under the Fourteenth Amendment to the United States Constitution."

"It is further charged that he was deprived of his right to be served with a copy of the information and given 24 hours thereafter within which he might examine the charge and prepare a defense."

"Because of these allegations, the petitioner prays that a writ of habeas corpus may issue, directing Neil Olson, Warden of the penitentiary, to bring the petitioner before the court to determine the facts and legality of the petitioner's imprisonment and dispose of the petitioner as law and justice may require, and release him from such false imprisonment, and that he may go hence without day."

"The federal Constitution does provide, in article V of the Amendments, as charged in the petition, that no person shall be held to answer for a crime such as was charged in this case unless upon an indictment of a grand jury, but section 10, art. I of the Constitution of Nebraska provides that the legislature may

provide for holding such persons upon the information of the public prosecutor, and section 26-901, Comp. St. 1929, provides that when a county attorney has sufficient evidence he is authorized to file such proper complaint as was done in this case, in strict accordance with the Nebraska Constitution and laws."

"It is also claimed in the petition that the petitioner is a Winnebago Indian and is under the exclusive jurisdiction of the federal government, and without the jurisdiction of the district court of Nebraska. However, chapter 15, title 18 U. S. C. A., sec. 548, of the federal Penal Code, provides generally that all Indians committing a crime, either within or without an indian reservation within the boundaries of a state, shall be subject to the same laws, and tried in the same courts, and subject to the same penalties as all other persons."

Whereupon, the court disposed of the matter by holding that the "judgment of the trial court was right, and it is hereby affirmed. AFFIRMED." (R. 16)

Upon the following reasons to-wit:

"this court has adopted the rule to be "The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him." (R. 14).

"A defendant, by pleading guilty, waives all defenses (service of the copy of the accusation and twenty-four (24) hours to examine the charge and prepare a defense) other than that the indictment charges no offense." (R. 14).

The Supreme Court of Nebraska held in substance and in fact in their opinion, that:

'A plea of guilty by petitioner stood as a jurisdictional bar to attack his judgment of conviction entered by

the district court of Thurston County, Nebraska, in violation of the procedural guaranties contained in the Fourteenth Amendment of the Constitution of the United States, supra.' (R. 14-15). See also, Rice v. Olson, 13 N. S. C. J. 227.

Such a holding is in direct conflict with the following decisions and the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States. Compare,

Smith v. *O'Grady*, 312 U. S. 329, and the authorities there cited;

Ex parte M'Clusky, 40 Fed. Rep. 71; *Boyd* v. *O'Grady*, 121 Fed. (2d) 146.

See also, *Ex parte Kuwitzky*, 135, Neb. 466, 282 N. W. 396.

See also. *Dyhre* v. *Hudspeth*, 106 Fed. (2d) 286.

Under all these circumstances it must be held, it is submitted that petitioner's trial, conviction and commitment entered by the District Court of Thurston County, Nebraska, deprived him of his liberty without due process of law, in that they are unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, supra, and the courts of Nebraska have denied him his constitutional right to be released upon his petition for writ of habeas corpus. This being the case, we have to inquire into the remedy for such a situation and that leads us to our next argument.

II

Petitioner Being Remediless in the State Courts of Nebraska, to Extricate Himself from False Imprisonment by the Process of Habeas Corpus from a Judgment of Conviction Entered in Express Violation of the Procedural Guaranties Protected against State Invasion Through the Fourteenth Amendment of the Constitution of the United States, Such Exceptional Circumstances of Peculiar Urgency Exist as to Require the Intervention of This the Supreme Court of the United States, Else He Is Left Remediless.

The Fourteenth Amendment of the Constitution of the United States declares that:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, * * *, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Jurisdiction of This Court

I

The Judgment Sought to Be Reviewed Is Final in Character

The order of the Supreme Court of Nebraska entered on April 7, 1944, affirming the judgment below (R. 10), and order overruling Motion for Rehearing (R. 16) finally disposed of all questions presented by the record. *De Bolt* v. *McBrien*, 96 Neb. 237, 147 N. W. 462. That a judgment of the highest court of a state affirming an order dismissing

a petition for writ of Habeas Corpus is final in character is not debatable. Compare, *Bryant* v. *Zimmerman*, 278 U. S. 63 (at p. 70), wherein this the Supreme Court of the United States said:

> "In the early case of Holmes v. Jennison, 14 Pet. 540, 563, 568, 597, this Court held after much consideration that a proceeding in habeas corpus in a state court to obtain release of one held in custody upon a criminal charge, where the detention is alleged to be in violation of the Constitution of the United States, is a 'suit' within the meaning of the jurisdictional statute, and that an order of the state court of last resort refusing to discharge him is a final judgment in that suit and subject to review by this Court. That holding has been respected and given effect in an unbroken line of later decisions, all of which in their material facts and surroundings were like the case now before us. It also has been followed in other cases related in principle."

II

A Substantial Federal Question Was Properly Presented to the Courts Below

The petition for writ of Habeas Corpus (R. 1-8), and the motion for new trial (R. 8-9) were drawn by a fellow inmate of the Nebraska State Penitentiary. Nevertheless, they were adequate to present the question whether the judgment of conviction entered by the District Court of Thurston County, Nebraska, pursuant to which petitioner is now being detained in the Nebraska State Penitentiary, were unconstitutional and void, as having been entered in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, supra.

The undisputed facts set forth in the petition were the allegations that:

Petitioner was condemned by a court without jurisdiction of the subject matter on lands reserved to the jurisdiction of the federal courts for prosecution; that he was deprived of his fundamental rights to be served with a copy of the accusation (information) and twenty-four (24) hours to examine the charge, consult with counsel and prepare a defense; that the trial court failed to complete the court by an assignment of counsel and summons of witnesses and empaneling a trial jury; that the judgment of sentence was unconstitutional and void; in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, supra.

The fact that petitioner based his contentions solely on the Fourteenth Amendment of the Constitution of the United States and presented for the courts of Nebraska's consideration whether a judgment of conviction rendered in express violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United Sates, supra, is such that it is void and may be questioned collaterally. See question presented in petitioner's brief page 4, also brief in support of motion for new trial pages 5, 6, clearly presented a claim of federal protected right. In *Bryant* v. *Zimmerman*, 278 U. S. 63, Mr. Justice Van Devanter said at page 67:

> "No particular form of words or prase is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Assuming, that by the record a federal question which was substantial in fact were squarely presented, there remains for this Courts consideration, whether under

the decisions rendered in the case at bar by the Supreme Court of Nebraska, if he is remediless, and whether this Court is free, on petition for writ of writ of Habeas Corpus, to consider the facts upon which petitioner's claim that the judgment of conviction deprived him of his liberty without due process of law in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, supra. Where the writ of Habeas Corpus is invoked in state tribunals, this Court looks to the courts of that state for a definition of the scope of the proceedings. *Henderson* v. *Lowry*, 301 U. S. 242; compare *Chambers* v. *Florida*, 309 U. S. 227. See also, *Ex parte Henry Hawk*, 321 U. S. 114 and the authorities there cited and relied upon by petitioner for his release in the State courts of Nebraska.

Thus in *Michaelson* v. *Beemer*, 72 Neb. 761, 101 N. W. 1007, the court held, in habeas corpus proceedings, that the right to trial by jury could not be waived on agreement of the parties and a judgment of conviction based on a trial to court were absolutely void, and should be set aside (101 N. W. at p. 763).

In re Resler, 115 Nebr. 335, 212 N. W. 765, the prisoner sued out a petition for writ of habeas corpus asking an inquiry into the validity as to whether her imprisonment in the county jail constituted double jeopardy in violation of the State Constitution, the Supreme Court of Nebraska on an original application ordered the prisoner discharged in that: "the constitutional rights of the defendant were violated by her second arrest and detention for the same offense contrary to the express terms of the Constitution that no person shall be twice brought in jeopardy for the same offense." citing *Neilsen, Petitioner*, 131 U. S. 176.

To the same effect see *Kuwitzky* v. *O'Grady*, 135 Neb. 466, 282 N. W. 396, the prisoner was released even though

he *pleaded guilty* and was sentenced by a court without jurisdiction to proceed to judgment of conviction.

On the other hand, in the case of *Darling* v. *Fenton*, 120 Neb. 829, 225 N. W. 582, the Supreme Court of Nebraska held that on petition for writ of habeas corpus, the court could not inquire into whether the judgment, pursuant to which petitioner was being detained, had been entered as the result of a plea of "guilty" to a charge of murder induced by fear of mob violence.

This case was cited with approval in *Carlsen* v. *State*, 129 Neb. 84, 261 N. W. 339, wherein the Court said at page 345:

> "* * * it should be noted that the writ of habeas corpus does not afford a corrective judicial process to remedy an error of fact at the trial, without which a conviction would not have resulted. HABEAS CORPUS IS NOT A PROPER REMEDY TO SECURE A RELEASE FROM PRISON OF ONE SENTENCE UPON A PLEA OF GUILTY INDUCED BY FEAR. Darling v. Fenton, 120 Neb. 829."

In the instant case *Rice* v. *Olson*, 13 Nebraska Supreme Court Journal 227 (herewith submitted, marked Exhibit "A"), at page 229, the court said:

> "We have also examined the case of Smith v. O'Grady, 312 U. S. 329, 61 S. Ct. 572, and also the memorandum opinion in Ex parte Williams and Bennett, decided January 4, 1943, and found in 317 U. S. 604, 63 S. Ct. 431, and find nothing which conflicts with the ruling herein."

And:

> "In the case at bar, as the record shows affirmatively that the defendant had pleaded guilty, this absolutely waived this and all other preliminary steps in connection therewith, so this allegation has no merit. * * * * * *."

In a similar case as the one at bar, this Court in *Smith* v. *O'Grady, supra,* held in substance that:

> 'Of the contention that petitioner by his plea of guilty forever waived his Constitutional right to attack a judgment of conviction entered in express violation of the procedural guaranties contained in the Fourteenth Amendment of the Constitution of the United States, that contention falls with the premise.' And reversed the Supreme Court of Nebraska, and in no uncertain terms reprimanded the Supreme Court of Nebraska for the flagrant manner in which it had sanctioned a deprivation of life and liberty in violation of the Constitution of the United States.

It is worthy of consideration to point out to the Court at this time, that if the scope of the writ of habeas corpus is so narrow as to preclude consideration of the facts set forth in the record before the Court, then the Nebraska law provides no remedy for the vindication of petitioner's federal protected rights, as the writ of erro CORAM NOBIS has been abolished by recent legislation in the State of Nebraska. Compare, 19 Nebraska Law Bulletin 150; See also *Rice* v. *Olson,* 13 Nebraska Supreme Court Journal 227, 229, at page 228, par. 4. Exhibit "A".

Petitioner having shown that he has been deprived of his liberty in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, supra, and left remediless, by the state courts of Nebraska, it is incumbent upon this Court to protect his federal protected rights. Compare *Rogers* v. *Alabama,* 192 U. S. 226, where Mr. Justice Holmes said (at page 230):

> "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the right." *Smith* v. *O'Grady, supra.*

Conclusion

Equal protection of the laws, and due process of law secured and guaranteed by the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, *supra*, are the pillars upon which our democracy rests. A denial of those rights to the humblest of us is a threat to the liberties of all.

Liberty must be taken only in accordance with those established modes of procedure which have been tried and tested by time. If the experience of our centuries of the common law has demonstrated that trial and conviction in a court of competent jurisdiction, where the defendant has been properly notified and served with a copy of the charge for which he is to answer and is appropriately represented and advised by competent and legal counsel and trial by jury, and to be tried by a court with jurisdiction of the place and subject matter, is better than and preferable to a trial, conviction and commitment obtained by ordeal and mobocracy in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, supra, then it is respectfully submitted that the questions raised in the petition for writ of certiorari calls for the exercise by this Court of its supervisory powers to the end that rights guaranteed under the Constitution of the United States and recognized by all civilized nations shall be preserved.

Respectfully submitted,

RICHARD RICE,
In Persona.

In the Supreme Court of the United States

October Term, 1944

No. 391

RICHARD RICE, PETITIONER,

vs.

NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF FOR THE PETITIONER

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COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

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BRIEF FOR THE PETITIONER

OPINION BELOW

This case comes before the Supreme Court of the United States on writ of certiorari to the Supreme Court of the State of Nebraska. The opinion of the Supreme Court of the State of Nebraska appears in —— Neb.[1] ——, 14 N. W. 2d 850.

1 At the time of the printing of this brief the official Nebraska report containing the opinion has not been published.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Supreme Court of Nebraska was entered on April 7, 1944 (R. 11). Rehearing was denied June 9, 1944 (R. 16). The petition for writ of certiorari was filed on August 24, 1944, and was granted on October 16, 1944 (R. 17).

The jurisdiction of this Court rests upon Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, being 28 U. S. C. A. Section 344 (b), and paragraph 5(a), Rule 38 of the Rules of the Supreme Court of the United States.

The petitioner contends that his constitutional rights and liberty under the Federal Constitution have been violated by the refusal of the Supreme Court of Nebraska to grant his application for a writ of habeas corpus, particularly the petitioner's right to the protection of his rights and liberties under the Fourteenth Amendment to the Federal Constitution (R. 2, 5).

The petitioner further contends that he is restrained of his liberty and confined to the State Penitentiary in Nebraska as a result of a judgment and sentence imposed by the District Court of Thurston County, Nebraska, for an alleged crime for which, under the circumstances more particularly set forth, he was subject to trial exclusively in a Federal Court (R. 2, 5).

o

STATEMENT OF THE CASE

The petitioner filed in the District Court of Lancaster County, Nebraska, on July 30, 1943, his petition for a

writ of habeas corpus. This petition was in the nature of an application, alleging that the petitioner's trial and conviction deprived him of his liberty without due process of law, and praying that a writ of habeas corpus may issue to bring the petitioner before the court forthwith, together with the true cause of his detention, to the end that inquiry might be had in the premises, and that the Court might proceed in a summary way to determine the facts and the legality of the petitioner's imprisonment (R. 1 and 7). The District Court of Lancaster County dismissed this petition and denied the application on August 11, 1943, stating that "no grounds is shown for the issuance of the writ prayed for" (R. 8). The petitioner filed a Motion for New Trial in the District Court of Lancaster County on August 17, 1943 (R. 8, 9). This motion was overruled by the District Court of Lancaster County on August 26, 1943 (R. 10). The petitioner then appealed to the Supreme Court of Nebraska, which entered a judgment on August 7, 1944, finding no error apparent in the record of the proceedings and judgment of the District Court (R. 10).

The application for the writ of habeas corpus set forth the following facts material to the consideration of the questions presented:

> The petitioner is a Winnebago Indian, by birth a resident of Winnebago, Nebraska, a ward of the Federal Government, and is an Indian of the Winnebago Tribe, located in the State of Nebraska (R. 2, 6). On May 22, 1940, an information was filed charging the petitioner and one Joe Bigbear with forcibly entering and breaking into a certain dining hall in

the Village of Winnebago, in Thurston County, Nebraska, which said dining hall, the information charged, is owned by the Winnebago Indian Mission of the Reform Church in America, with the intent to steal property valuse contained in said building (R. 3). It is alleged in the petitioner's application for a writ of habeas corpus that the alleged crime was committed on "indian Reservation Government property" (R. 5).

The petitioner waived preliminary hearing in the County Court of Thurston County, Nebraska, and on October 14, 1940 was brought before the District Court of Thurston County, Nebraska for arraignment upon information filed for burglary (R. 4).

The Journal entry in the District Court of Thurston County, Nebraska with reference to the arraignment and sentence is as follows (R. 4, 5):

> "Defendant having waived preliminary hearing in the County Court and now being brought before the court for arraignment upon the information; this cause came on for hearing upon the information filed herein. The state appearing by said County Attorney and the Defendant appearing in person. The Defendant was thereupon arraigned upon the information filed herein for burglary and after the same was read to him in open court, and he was asked how he pled thereto, to which he replied 'Guilty.'
>
> "The court thereupon read Section 28-538, C. S. 1929, Nebraska, and asked the Defendant if after knowing what penalty would be inflicted upon him under his plea of guilty, he still desired to plead guilty, to which question of the court, he replied in the affirmative.

"Whereupon the Defendant was asked if he had anything to say why judgment should not be passed upon him, the Defendant replied that he had nothing to say.

"The statement of the County Attorney was then read.

"The Court thereupon passed judgment and sentence of the court upon the defendant, as follows: It is the judgment and sentence of the Court that you be confined in the penitentiary of the State of Nebraska, at hard labor, no part of which shall be in solitary confinement and Sundays and holidays excepted as to hard labor, for a period of from one (1), to seven (7), years, and pay the costs of prosecution, and that you be committed to the custody of the Sheriff of Thurston County, Nebraska, who will see that you are conveyed to the above institution for execution of this sentence, By the Court: Mark J. Ryan District Judge "Filed October 14, 1940; Moris Rasmussen, Clerk Dist. Court." State of Nebraska, Thurston County) ss. I, Moris Rasmussen Clerk of the District Court of said County, hereby certify that the above and foregoing is a true and correct copy of the original now of record in this office. In testimony whereof I have hereunto set my hand and affixed the seal of said court this 9th day of October, 1942, Moris Rasmussen, Clerk of the District Court."

The Trial Court did not advise the petitioner of his constitutional rights to the assistance of counsel and witnesses for his defense, nor did the petitioner waive those constitutional rights either by action or words (R. 5). The entire trial and conviction lasted less than twenty minutes (R. 4). The trial, conviction and commitment were obtained by ordeal and

"mobocrary" (R. 7). The petitioner was deprived of his constitutional right to be informed of the nature and cause of the accusation before being placed on his defense in that he was deprived of the right to be served with a copy of the accusation and was not allowed twenty-four hours within which to examine the charge and prepare a defense (R. 7).

After the petitioner had been confined in the penitentiary for a year and a half he was informed that his remedy was to file a writ of error coram nobis which was dismissed for want of prosecution by counsel to whom petitioner's sister had paid a fee of $75.00 (R. 6).

The petitioner is thirty years of age (R. 6). He is ignorant of the "sience" of law, has never "studdied" law, and has had no one to champion his cause of action only the assistance of a fellow inmate (R. 6).

Although he had served ten months of a previous sentence of one year in the Men's Reformatory at Hawthorne, having been discharged in 1936, he was sentenced to an indeterminate sentence, contrary to the provisions of the Nebraska statute making an indeterminate sentence applicable only in cases of persons not previously confined in any penitentiary (R. 3).

In his motion for a new trial in the District Court of Lancaster County from the judgment of the Court denying his application for a writ of habeas corpus, the

petitioner prayed for the assistance of counsel, but none was accorded him (R. 9).

There is no showing in the record of any answer or objections of any sort filed in response to the petitioner's petition and application for a writ of habeas corpus in the District Court of Lancaster County, Nebraska. The Supreme Court of Nebraska answered the contention by stating in its opinion that a waiver of the constitutional right of the assistance of counsel will be implied where an accused, being without counsel, fails to demand that counsel be assigned him, particularly where an accused voluntarily pleads guilty (R. 14). And the Supreme Court of Nebraska answered the contention of the petitioner that he was subject to trial and conviction for the alleged crime exclusively in the jurisdiction of federal courts by stating that the Federal Penal Code provides generally that all Indians committing a crime, either within or without an Indian Reservation within the boundaries of a state, shall be subject to the same laws, and tried in the same courts, and subject to the same penalties as all other persons (R. 13 and 14).

SPECIFICATION OF ERRORS

1. The petitioner is deprived of his liberty without due process of law, contrary to the provisions of the Fourteenth Amendment in that he was not afforded any opportunity to have the assistance of counsel.

2. The petitioner is deprived of his liberty without due process of law, contrary to the provisions of the

Fourteenth Amendment, in that he did not waive his right to the assistance of counsel by pleading guilty, nor by any intelligent or intentional failure to request the assistance of counsel.

3. The petitioner, an Indian, was convicted and tried in a state court, and is now confined in a state penitentiary under a sentence imposed by a state court for a crime for which he was subject to trial and penalty only in a federal court.

SUMMARY OF ARGUMENT

The right to the assistance of counsel is one of the most fundamental human rights protected under the Fourteenth Amendment of the Constitution of the United States. At least under certain circumstances this fundamental right is protected under the Fourteenth Amendment from violation in proceedings in state courts. The conditions whereby this Indian petitioner was sentenced for one to seven years at hard labor in the penitentiary of the State of Nebraska, in a summary proceeding lasting less than twenty minutes, present circumstances so contrary to natural, inherent, and fundamental principles and fairness as to amount to a violation of due process of law under the Fourteenth Amendment. Nor was there any waiver of the right to assistance of counsel by reason of the petitioner having plead g.. lty, and there is no evidence or even suggestion in the record to show that there was any intelligent or intentional waiver of the right of the petitioner to the assistance of counsel.

A further reason for granting the application for the writ of habeas corpus is that the application alleges facts the proof of which would establish that the petitioner was in fact subject to trial and penalty for the alleged crime exclusively in the jurisdiction of the United States under the provisions of Section 328 of the Criminal Code of the United States (Title 18 U. S. C. A. Section 548) with reference to the trial of Indians for crimes.

ARGUMENT

I.

THE PETITIONER WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE HE WAS NOT PROVIDED WITH THE ASSISTANCE OF COUNSEL.

In his application for a writ of habeas corpus, the allegations of which remain uncontroverted in the record, the petitioner alleged that he was an Indian of the Winnebago Tribe located in Thurston County, Nebraska, was ignorant of the "...ience" of law, had never "studdied" law, and had no one to champion his cause of action except the assistance of a fellow inmate. The application for the writ alleged as follows:

> "Upon the arraignment the record bespeaks the truth that the Trial Court did not advise your petitioner of his Constitutional rights to the assistance of Counsel and witnesses for his defense; nor the right to be charged and informed of the nature and cause of the accusation by indictment or presentment of a Grand Jury guaranteed by the Fourteenth, Fifth and Sixth Amendments to the Constitution of

of the United States; nor the right to trial by jury guaranteed by Art. I, Sec. 6; Nebr. Const.; nor did your petitioner herein waive those constitutional rights either by action or words."

Other circumstances with reference to the conviction and incarceration of the petitioner which are alleged in his application for the writ of habeas corpus are set forth in greater detail below, in connection with the discussion of the cases and the law with respect to the right of an accused to be provided with the assistance of counsel.

The petitioner respectfully urges that his conviction without the assistance of counsel deprived him of due process of law in violation of the Fourteenth Amendment to the Constitution of the United Sttaes, particularly in view of the circumstances existing in this case.

THE RIGHT TO ASSISTANCE OF COUNSEL AS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT—GENERALLY.

The fundamental character of the right to the assistance of counsel in a criminal proceeding in a state court, as a right included in the conception of the due process clause of the Fourteenth Amendment was carefully analyzed in *Powell v. Alabama*, 287 U. S. 45, 77 L. ed. 158, 84 A. L. R. 527, where this Court said, the opinion quoting in part from the opinion in *Twining v. New Jersey*, 211 U. S. 78, 99, 53 L. ed. 97, 106:

"'It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. Chicago B & Q R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979. If this is so, it is

not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.' While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, make it clear that the right to the aid of counsel is of this fundamental character."

In *Brown v. Mississippi*, 297 U. S. 278, 80 L. ed. 682, this Court in reviewing a judgment of the Supreme Court of the state of Mississippi affirming a conviction of crime had occasion to consider the limitations upon the regulation by a state of the procedure of its courts resulting from the requirements of the "due process of law" clause of the Fourteenth Amendment. Recognizing that a state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, within certain limitations, it is pointed out in the opinion in that case that the freedom of a state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. This Court in that opinion made a distinction between matters which a state is free to regulate in accordance with its own conception of policy, and those rights and privileges which, in the language of this opinion, "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." And referring specifically to the right of an accused to the assistance of counsel, it was stated in *Brown v. Mississippi*, *supra*, that:

> "The state may not deny to the accused the aid of counsel."

In *Avery v. Alabama*, 308 U. S. 444, 84 L. ed. 377, a case coming before this Court on review of a judgment of the Supreme Court of Alabama affirming a conviction in a Circuit Court of that state, the question presented was whether there had been a violation of the accused's rights under the Fourteenth Amendment. In that case counsel had in fact been appointed, but the question of the right of an accused resulted in connection with a contention with respect to the opportunity for appointed counsel to confer with the accused and adequately prepare his defense. In discussing this question this Court said in *Avery v. Alabama, supra:*

> "Had petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guaranty of assistance of counsel would have required reversal of his conviction."

This Court has in many cases held that certain of the rights protected against national action by the first eight amendments to the Constitution are equally protected against state action under the due process of law clause of the Fourteenth Amendment. The more fundamental and the more deep rooted in the traditions and principles of justice and liberty is the right, the more certain it is to be a right safeguarded against state action by the due process of law clause of the Fourteenth Amendment. In *Johnson v. Zerbst*, 304 U. S. 458, 82 L. ed. 1461, this Court, in a case involving the right to the assistance of counsel under the Sixth Amendment to the Constitution, in a case coming before this Court from the Northern District of Georgia which dismissed a petition for a writ of habeas corpus on behalf of a petitioner who had been convicted in a United States District Court, emphasized

the fundamental character of the right of such assistance, in the following language:

> "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel. That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intrinsic, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to '. . . the humane policy of the modern criminal law . . .' which now provides that a defendant '. . . if he be poor, . . . may have counsel furnished him by the state . . . not infrequently . . . more able than the attorney for the state.' "

The untrained layman is just as lacking in the professional skill and knowledge necessary to prepare his defense in a state court as in a federal court. The guiding hand of counsel at every step in the proceedings is just as necessary to one on trial for a crime in a state court as in a federal court. The procedure to such a layman certainly may appear to be as intricate, complex and mysterious, if not more so, in a state court as in a federal court. The deprivation of life or liberty is just as conclusive and real to the accused whether the death penalty is imposed by a federal or a state court, or whether the accused is restrained in a federal or a state penitentiary. It is the protection of that life and liberty in accordance with the traditionally recognized fundamental principles of justice which is safeguarded by the requirements of the due process of law clause of the Fourteenth

Amendment. And it is because the right to assistance of counsel has been traditionally recognized as one of the most fundamental of such human rights that the freedom of a state establishing its policy is necessarily limited in this respect by the constitutional guarantees of the Fourteenth Amendment.

THE RIGHT TO ASSISTANCE OF COUNSEL AS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT—UNDER CERTAIN CIRCUMSTANCES.

In spite of the statements quoted above indicating that the right of an accused to the assistance of counsel in state courts is as fully protected by the due process clause of the Fourteenth Amendment as is the right of an accused to such assistance in federal courts under the Sixth Amendment, it is true that the opinion in *Powell v. Alabama, supra,* confined the holding in that case to the particular facts. And it is recognized that the phrase "due process of law" in the Fourteenth Amendment has been said by this Court "to formulate a concept less rigid and more fluid"[2] than the concept of that identical phrase in the Fifth Amendment. It is suggested in *Betts v. Brady,* 316 U. S. 455, 86 L. ed. 1595, that the particular facts in each case must be appraised. Before, however, proceeding to appraise the facts in the instant case, the distinction should be emphasized that while in *Betts v. Brady, supra,* the matter came before this Court on appeal from a judgment granting a writ of habeas corpus, but denying the relief prayed, the instant case comes before the Court on appeal from refusal to grant the writ because of the insufficiency of the

2 *Betts v. Brady,* 316 U. S. 455, 86 L. ed. 1595.

allegations of the application. No pleading of any kind was filed in response to the petitioner's application for a writ. Although this petitioner's allegations are undenied, he has had no chance to prove them. At the present stage of the proceeding in the instant case, unlike the accused in *Betts v. Brady, supra,* the petitioner does not necessarily ask this Court to apply a rule in the enforcement of the Fourteenth Amendment. The petitioner here is seeking the reversal of a judgment of the Supreme Court of Nebraska, and that a writ of habeas corpus may issue, in order that his fundamental rights may be protected.

The petitioner in the instant case, in his duly verified petition, alleges among the allegations thereof, the following:

> 1. That he is ignorant of the "sience" of law, has never "studdied" law, and has no one to champion his cause of action except the assistance of a fellow inmate (R. 6).
>
> 2. That his conviction and commitment are based on a swift, reckless sham and pretense of a trial (R. 2); that his trial, conviction, and commitment were obtained by ordeal and "mobocrary" (R. 7); that the proceeding by which he was tried and convicted consumed less than twenty minutes (R. 4); that he was not served with a copy of the accusation, nor allowed even 24 hours to examine the charge and prepare a defense (R. 7).
>
> 3. That the trial court did not advise the petitioner as to his constitutional rights to assistance of counsel and witnesses for his defense, nor to his right to trial by jury, and that he did not waive his constitutional rights either by action or words (R. 5).

4. That he is by birth an Indian of the Winnebago Tribe (R. 2 and R. 6), a resident of Winnebago, Nebraska, and a ward of the Federal Government (R. 2); that the alleged crime was committed on an "indian Reservation Government property" (R. 5); that if competent counsel had been assigned, he would have been able to convince the court that no jurisdiction rested in the Trial Court (R. 6 and R. 7).

Further indication of the hasty manner in which the petitioner was tried and sentenced is shown by the apparent lack of any inquiry as to the petitioner's previous record. Having already served a previous sentence (R. 2, 3), he was not subject to an indeterminate sentence such as was in fact imposed. The previous sentence had in fact been imposed in the District Court of Thurston County, Nebraska, on the information of the County Attorney thereof, but in spite of this fact, an indeterminate sentence was imposed by the Trial Court, which the Supreme Court suggests in its opinion was "either through inadvertence or misapprehension" (R. 15). There is no suggestion in the record that the petitioner ever claimed or had occasion to claim that the crime in the instant case was his first offense.

The circumstance that this petitioner alleges that he is an Indian of the Winnebago Tribe, a Ward of the Federal Government, and that his alleged crime was committed on an "indian Reservation Government property" deserves special comment.

The obligation with respect to the protection of Indians in their fundamental rights under the white man's law lends special force and significance to the right of assistance of counsel when the accused is an Indian.

Those rights which are recognized as existing under the "natural, inherent and fundamental principles of fairness" as "found in the common understanding of those who have lived under the Anglo-American system of law"[3] should be safeguarded with special concern when the accused is an Indian brought to trial in the courts of the white man. It has frequently been said that Indians are wards of the Government. Thus in *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, it was stated:

> "These Indian Tribes *are* wards of the nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen. * * * The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the Tribes."

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3 This language is from *Betts v. Brady*, 316 U. S. 455, 86 L. ed. 1595

The further circumstance that the petition alleges that the crime was committed on "indian Reservation Government property" emphasizes the importance of assistance of counsel. Complicated and somewhat technical jurisdictional questions necessarily result from the state of the law with respect to jurisdiction of criminal offenses alleged to have been committed by Indians. In the next portion of this brief there is more specific argument with respect to the question of jurisdiction over Indians in criminal cases. In the opinion of the Supreme Court of Nebraska in the instant case, it is stated that "the federal Penal Code provides generally that all Indians committing a crime either within or without an Indian Reservation within the boundaries of a state, shall be subject to the same laws, and tried in the same courts, and subject to the same penalties as all other persons" (R. 13, 14). The argument in the next portion of this brief will show that the question of jurisdiction over Indians committing criminal offenses may not be answered in such general terms as suggested in the opinion of the Supreme Court of Nebraska. And this very fact, that the eminent Supreme Court of Nebraska has apparently concluded in this case that the federal Penal Code makes no distinction between Indians and other persons committing crimes within the boundaries of a state, in and of itself forcefully illustrates that the need for the aid of counsel is especially inherent in the case of Indians.

As this Court has stated in *United States v. Kagama, supra:*

> "The relation of the Indian Tribes living within the boundaries of the United States, both before and since the Revolution, to the people of the United

States has always been an anomalous one and of complex character."

THE RIGHT TO ASSISTANCE OF COUNSEL—UNDER NEBRASKA LAW.

It is suggested in *Betts v. Brady*, supra, that the constitutional, legislative and judicial history of the states constitutes an authoritative source of the common understanding of those who have lived under the Anglo-American system of law, as to the extent to which due process of law demands that an indigent defendant in a criminal case be furnished counsel. The provisions of the Constitution and statutes of Nebraska on this subject matter, and the interpretation thereof by the Supreme Court of Nebraska afford some criterion of the extent to which the defendant in the instant case was denied due process of law. When it appears that in other Nebraska cases counsel has been provided, it is exceedingly difficult to reconcile the failure to provide counsel in the instant case with common and fundamental ideas of fairness and right, particularly when an appraisal of the circumstances in the instant case seems to suggest the special desirability of providing counsel.

The Constitution of Nebraska provides in Article I, Section 3:

> "No person shall be deprived of life, liberty or property, without due process of law."

The Constitution of Nebraska provides in Article I, Section 11:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person or by

counsel, to demand the nature and cause of accusation, and to have a copy thereof; * * * and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

And in Article I, Section 8, the Constitution of Nebraska provides:

"The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion, the public safety requires it, and then only in such manner as shall be prescribed by law."

Section 29-1803 of the 1941 Cumulative Supplement to the 1929 Compiled Statutes of Nebraska provides that:

"The court before whom any person shall be indicted for any offense which is capital, or punished by imprisonment in the penitentiary, is hereby authorized and required to assign to such person counsel not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours * * * ."

The statutory provision last above quoted appears in Section 29-1803 of the 1929 Compiled Statutes of Nebraska.[4] It appeared as part of Section 437 of Chapter XLII of the General Statutes of Nebraska of 1873. From time to time there have been amendments to this section which amendments have made provision with respect to the manner of allowance of claims for payment by the

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[4] The provision above quoted appears as part of Section 29-1803 of the Revised Statutes of Nebraska, 1943, printed by authority of the legislature of Nebraska by an enactment of the legislature in 1943, a four-volume revision being distributed to the lawyers of Nebraska as this brief is prepared in December, 1944. As of the time of the sentencing of the petitioner in the instant case, on October 14, 1940, the correct citation of the statutory provision above quoted in Section 29-1803 of the 1939 Cumulative Supplement to the Compiled Statutes of Nebraska for 1929.

County for the services of such appointed counsel, and for a public defender in more populous counties;[5] but the provision for requiring the appointment of counsel for any person indicted for a capital offense or an offense punishable by imprisonment in the penitentiary has remained unchanged in the statutory law of Nebraska for more than seventy years.

The Supreme Court of Nebraska has consistently recognized the right of an accused to the appointment of counsel under the statutory provision above quoted.

In *Smythe v. State*, 124 Neb. 267, 246 N. W. 461, the question was presented in a case in which the accused had rejected offers by the court to appoint counsel. Finding that the accused was competent at the time he voluntarily refused the aid of counsel, the Supreme Court of Nebraska used the following language, clearly indicating that the right to the aid of counsel exists unless voluntarily waived:

> "The right of a defense in a prosecution for a felony includes the right of accused to be represented by an attorney, but defendant refused offers therefor and conducted his own defense without counsel from the beginning of the trial until the jury rendered a verdict of guilty. The right to have an attorney was granted by statute and it was the duty of the trial court to appoint one for defendant at public expense, if he was unable to procure one of his own choosing. Comp. St. 1929, Sec. 29-1803, as amended by Laws, 1931, c. 65 Sec. 6. The right to a trial is a fundamental one, but accused may waive

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[5] The latest such amendment was in 1931 (1931 Session Laws of Nebraska, p. 179).

it and plead guilty.[6] He may likewise waive the right to counsel, if competent to do so. At the arraignment defendant rejected an offer of the trial court to provide counsel and the offer was repeated and rejected at the beginning of the trial. The record does not show that defendant, before and at the trial, was unable to select and procure the services of an attorney. It is well-settled law that the trial may proceed in absence of counsel for a mentally competent defendant who declined the court's offer therefor. It was not a peremptory duty of the court to force counsel upon him against his will. 16 C. J. 823. The evidence shows he was competent to refuse the aid of counsel when offered. * * * The record fails to show that defendant did not have time to prepare for trial after available counsel had been refused."

In *Bordeau v. State*, 125 Neb. 133, 249 N. W. 291, a defendant pleaded guilty to an information charging murder in the second degree, and later brought error to the Supreme Court of Nebraska to review a judgment denying a motion to vacate the former judgment and for leave to withdraw his plea of guilty and enter a plea of not guilty. In affirming the judgment the Supreme Court of Nebraska used the following language, indicative of the extent to which provision for assistance of counsel has been recognized in other cases in Nebraska:

"The evidence shows that on the night of October 16, 1930, defendant was questioned by the county attorney and made answers in writing, after having been fully advised as to his immunity. On the morning of October 17, 1930, he was taken to the county court for his preliminary hearing. He was offered

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6 The effect of a guilty plea as a waiver is discussed in the next portion of the argument, immediately following the citation of Nebraska cases.

an opportunity to consult counsel, and was informed that he would be furnished counsel if he so desired. He asked if he might act as his own attorney and did so. He was bound over to the district court. He immediately requested the county atorney to explain to him the different degrees of homicide, which was done. He offered to plead guilty to manslaughter, if the county attorney would charge that offense. The county attorney refused on the ground that he thought the facts indicated at least second degree murder. Later that day defendant told the county attorney he would plead guilty to murder in the second degree, if so charged. When he was so charged and was brought before the district court to be arraigned, the court very carefully and methodically explained to him his right to have counsel (either of his own or appointed by the court) and all other rights afforded him by law, including the nature of the charge and the penalties. He told the court he had not been influenced by promises or coercion or in any other manner in reaching this decision to plead guilty. Upon acceptance of such a plea, the court told defendant he could have anyone he desired talk to the court and that a full investigation would be made before sentence. Defendant was unusually well advised of and protected as to his legal rights. He was competent to refuse and did refuse counsel."

The record of the proceeding lasting less than twenty minutes in which the Indian petitioner was arraigned and sentenced in the instant case, and during the course of which there was no mention of counsel, casts grave doubt as to whether the petitioner was convicted by a proceeding conducted in accordance with fundamental principles of justice and fairness, when compared with the record set forth in the quotation above.

Again, in *Stagemeyer v. State,* 133 Neb. 9, 273 N. W. 824, the Supreme Court of Nebraska, after referring to the provisions of the Nebraska constitution providing for and defining the rights of an accused in criminal prosecutions, said:

> "Without an extended discussion of these paragraphs, it may be said that the right of the accused to counsel and due preparation for his trial cannot be gainsaid."

The opinions quoted above from Nebraska cases were rendered within a period of seven years immediately preceding the arraignment and sentence of the Indian petitioner in the instant case. In view of these unqualified expressions of the right of an accused to the assistance of counsel, it is difficult to understand how the petitioner in the instant case can be said to have been accorded due process of law in accordance with fundamental principles of fairness and justice as commonly understood in the system of law under which justice is administered among white men in Nebraska.

THE RIGHT TO THE ASSISTANCE OF COUNSEL IS ONLY WAIVED BY AN INTELLIGENT AND COMPETENT WAIVER.

The answer of the Supreme Court of Nebraska to the contention of the petitioner, that he was deprived of due process of law, under both the Constitution of the United States and the Constitution of Nebraska, because he was not provided with the assistance of counsel, is that a waiver of this right will be implied where an accused who is without counsel fails to demand that counsel be assigned to him, particularly when the accused pleads guilty. (R. 14).

It becomes very pertinent, therefore, to consider the effect of failure by an accused to demand counsel and the plea of guilty upon his right to have assistance of counsel.

The right to the assistance of counsel being a fundamental constitutional right, courts should indulge every reasonable presumption against the waiver of that right. As this Court said in *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 307, 81 L. ed. 1093, 1103:

> "We do not presume acquiescence in the loss of fundamental rights."[7]

It is proper and necessary that there should not be any presumption that the right to assistance of counsel has been waived, for an accused may be entirely ignorant of his right to demand such assistance. The very existence of the right, the same sense of fairness and justice which prompts the provisions whereby an accused may have the assistance of counsel, of necessity imposes a responsibility to make certain that the accused knows of that right. Otherwise there can be no intelligent waiver of it.

These principles were set forth in *Johnson v. Zerbst*, 304 U. S. 458, 82 L. ed. 1461, 146 A. L. R. 357, a case of which the commentator in American Law Reports states: "This case has had great influence in the law of habeas

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[7] There are, of course, numerous additional authorities to the same effect: *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389, 81 L. ed. 1177; *Hodges v. Easton*, 106 U. S. 408, 27 L. ed. 169; *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 57 L. ed. 879; *Patton v. United States*, 281 U. S. 276, 74 L. ed. 854 *Dimick v. Schiedt*, 293 U. S. 474, 79 L. ed. 603.

corpus." In this case the following language is especially pertinent:

> "The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record. * * *
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> "The purpose of the constitutional guaranty of a right to Counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution. True, *habeas corpus* cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of *habeas corpus* cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty."

In the case of *Walker v. Johnston*, 312 U. S. 275, 85 L. ed. 830, a case in which the accused had pleaded guilty, there were conflicting affidavits as to whether or not the accused had stated in open court that he did not desire counsel. In remanding the case for further proceedings and evidence this Court said:

> "If he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the

prosecution into entering a guilty plea, he was deprived of a constitutional right."

In the case of *Evans v. Rives*, 126 Fed. 2nd 633, it was contended by counsel opposing issuance of a writ of habeas corpus, in the United States Court of Appeals for the District of Columbia, that the opinion in *Johnson v. Zerbst, supra,* did not apply to convictions upon guilty pleas. This contention was answered by reasoning which is most appropriate in the instant case, in answer to the contention that the petitioner in the instant case waived his right to the assistance of counsel by pleading guilty:

> "It is, however, contended by the District of Columbia that Johnson v. Zerbst does not apply to convictions upon pleas of guilty but only in the case of pleas of not guilty and trial and conviction thereon, and that therefore it does not govern in the instant case. *A priori,* there would seem to be no proper basis for such a distinction. Loss of life or liberty is as certain through sentence upon a plea of guilty as through sentence upon the verdict of a jury. The importance to an accused of the assistance of counsel in the event of a plea of not guilty and trial is patent. It is equally important to an accused, in determining in what manner he may properly meet a charge and before a decision as to the nature of his plea, to have the advice of counsel concerning, for example, the sufficiency of the indictment, the possible existence of a defense or bar under facts known to the accused but the legal import of which he may not know, the nature of the penalty provided for the offense charged, and the probable extent to which it will be imposed, under the facts involved, in the event of a plea of guilty. But the point raised by the District need not be determined upon *a priori* basis. The Supreme Court in Walker v. John-

ston, 1941, 312 U. S. 275, 61 S. Ct. 574, 85 L. ed. 830, has negatived any possible support for the contention that the constitutional guaranty of the assistance of counsel in a criminal case is not applicable where there is a plea of guilty."

The circumstance of the guilty plea should not operate as a waiver of the right to assistance of counsel by reason of any contention that even though counsel had been appointed no other plea might properly have been made. As a matter of fact, totally apart from any question of guilt or innocence, had counsel been appointed for the accused in the instant case, his services in maintaining that the accused was subject to trial only in a federal court might well have been much more than perfunctory. Further, as pointed out in *Evans v. Rives, supra,* the scope of review on habeas corpus is limited to an examination of the jurisdiction of the court whose judgment of conviction is challenged.[8] And there is the further answer to the possible contention that the petitioner was not seriously prejudiced by lack of counsel that speculation in this regard is not consistent with the fundamental nature of the right to assistance of counsel. As stated in *Glasser v. United States,* 315 U. S. 60, 86 L. ed. 680:

> "The right to have the assistance of counsel is too fundamental and absolute to indulge in mere calculations as to the amount of prejudice arising from its denial."

See also, *Ex Parte Richard Quirin,* 317 U. S. 1, 87 L. ed. 3.

8 There is cited in *Evans v. Rives,* 126 Fed. 2nd 633, in support of this proposition the case of *Bowen v. Johnston,* 306 U. S. 19, 83 L. Ed. 455, in which the same proposition is set forth with numerous cases cited in support thereof.

In this connection it may be appropriate again to refer to the record in the instant case. It must be remembered that the application for the writ of habeas corpus was prepared by a petitioner who had no one to champion his cause "only the assistance of a fellow inmate" (R. 6). In his motion for a new trial in the District Court of Lancaster County, the petitioner asked that assistance of counsel be granted him (R. 9). The application does unequivocally allege that the trial court did not advise the accused of his right to the assistance of counsel, and that the accused did not either by action or words waive his constitutional rights (R. 5). The record of the arraignment and judgment in Thurston County, Nebraska, is entirely silent on the matter of appointment of counsel (R. 4). The Supreme Court of Nebraska considered that there was a waiver of the right to assistance of counsel by reason of the guilty plea, and failure to demand counsel (R. 14).

Granting that "the determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused"[9] the record in the instant case is wholly lacking in any indication of an intelligent waiver. There is nothing in the record to suggest that the accused waived his right to the assistance of counsel "with full knowledge of his rights and capacity to understand them."[10] The issue as

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9 This language is from *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. ed. 461, discussed in detail, *supra*.

10 This language is from *United States* v. *Adams*, —— U. S. ——, 88 L. ed. 16 (Adv. Op.).

raised is rather that the accused did not so waive his rights.

In *Holiday v. Johnston*, 313 U. S. 342, 85 L. ed. 1392, it was contended that the petition for a writ insufficiently alleged a denial of the constitutional right to assistance of counsel. In reply to this contention, it was stated by this Court:

> "A petition for habeas corpus ought not to be scrutinized with technical nicety."

This would clearly seem to be true in the case of an application submitted by one who at the time of its submission had only the assistance of a fellow inmate. Any other attitude with respect to the technical sufficiency of such a pleading would not be consistent with the very right to liberty which the due process clause is designed to protect, in accordance with fundamental conceptions of fairness in our system of law.

It is true that the authorities cited above in connection with the argument concerning waiver of the right to assistance of counsel are cases in which the question of waiver arose in proceedings in federal courts. The opinion in *Evans v. Rives, supra*, analyzes closely the effect of the opinions in *Johnson v. Zerbst, supra*, and *Walker v. Johnston, supra*, upon the holdings of sixteen cases decided by federal courts in various circuits, and makes clear that in view of sound reasoning and the authority of *Johnson v. Zerbst, supra*, and *Walker v. Johnston, supra*, the basis for the decisions in the sixteen cases is not warranted. It is respectfully urged that the same reasoning set forth in *Johnson v. Zerbst, supra, Walker*

v. Johnston, supra, Glasser v. United States, supra, and *Evans v. Rives, supra,* applies with equal force and significance when the question of waiver arises in a criminal proceeding in a state court. Indeed in the opinion in *Glasser v. United States, supra,* the fundamental character of the right to assistance of counsel under the Sixth Amendment as a safeguard to human life and liberty is illustrated by the determination of the fundamental character of that right as protected in state courts under the due process clause of the Fourteenth Amendment.[11]

Whatever distinction may exist with respect to the "less rigid and more fluid"[12] concept of the due process of law clause in the Fourteenth Amendment, as distinguished from the provisions of the Fifth and Sixth Amendments, certainly the concept of waiver—"the intentional relinquishment of a known right or privilege"[13] —is the same, whether it is contended that the right to assistance of counsel is waived in a state court or in a federal court. In a state court as well as in a federal court, to arbitrarily hold that a guilty plea waives the right to assistance of counsel would make possible under

11 "Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A. L. R. 527, so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." *Glasser v. United States,* 315 U S. 60, 86 L. ed. 680.

12 This language is from *Betts v. Brady,* 216 U. S. 455, 86 L. ed. 1595

13 *This language is from Johnson v. Zerbst,* 304 U. S. 458, 82 L. Ed. 1461

the guise of waiver the most extenuating violation of fundamental rights of human life or liberty which the Fourteenth Amendment is designed to safeguard. In a state court as well as in a federal court to say that the right is waived by failure to make demand for counsel, in utter disregard of whether the accused even knew of the existence of the right, results unavoidably in making a mere sham of this fundamental right to be heard and to the assistance of counsel. In a state court as well as in a federal court, to accept anything less than an intelligent or intentional voluntary waiver of a known right to assistance of counsel will result in depriving an accused of the fundamental right to assistance of counsel in the very cases in which the accused is most in need of the protection of his fundamental human rights.

The Supreme Court of Nebraska in the instant case, in holding that the petitioner had waived his right to the assistance of counsel by pleading guilty and failing to request that counsel be assigned to him, relied upon two earlier opinions of the Supreme Court of Nebraska and one opinion of the Fourth Circuit Court of Appeals (R. 14). Like fifteen of the sixteen cases from federal courts in various circuits which are analyzed in *Evans v. Rives, supra*, the two Nebraska cases were decided prior to *Walker v. Johnston, supra*.[14] And the one federal case

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14 *Alexander v. O'Grady*, 137 Neb. 645, 290 N. W. 718, was decided March 8, 1940. Certiorari denied in United States Supreme Court October 21, 1940, 311 U. S. 682, 85 L. ed. 439; *Davis v. O'Grady*, 137 Neb. 708, 291 N. W. 82, was decided March 22, 1940. Certiorari denied in United States Supreme Court, October 21, 1940, 311 U. S. 682, 85 L. ed. 440. *Walker v. Johnston*, 312 U. S. 275, 85 L. ed. 830, was argued January 15, 1941 and decided February 10, 1941. (The petitioner in *Walker v. Johnston*, however, pleaded guilty on April 28, 1936, while the petitioner, Richard Rice, in the instant case pleaded guilty on October 14, 1940 (R. 4).)

cited by the Supreme Court of Nebraska is *Cundiff v. Nicholson*, 107 Fed. 2d 162, decided prior to *Johnson v. Zerbst, supra*, and *Walker v. Johnston, supra*. The case of *Cundiff v. Nicholson, supra*, is one of the cases of which the Court of Appeals of the District of Columbia said, in *Evans v. Rives, supra:*

> "In view of the ruling in Johnson v. Zerbst, that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in loss of fundamental rights,' this basis of decision is not warranted."

And referring specifically to the opinion of the Fourth Circuit Court of Appeals in *Cundiff v. Nicholson, supra*, the Court of Appeals of the District of Columbia said, in *Evans v. Rives, supra:*

> "And the assumption that had counsel been appointed for the petitioner at the outset of the criminal proceeding they could honestly have entered no other plea than that which the petitioner himself, without benefit of counsel, had entered, is, we think, unwarranted and dangerous."

In addition, the Supreme Court of Nebraska relies upon two statements from the text of Corpus Juris and Corpus Juris Secundum[15] (R. 14). An examination of these texts shows that the authorities cited are cases decided prior to *Walker v. Johnston, supra*.

In considering the chronology of the opinions, however, it should be emphasized that the opinion in *Walker v. Johnston, supra*, was rendered February 10, 1941, two and a half years before the District Court of Lancaster

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15 16 C. J. 821 and 23 C. J. S. p. 314, Sec. 979.

County denied the petitioner's application in the instant case on August 11, 1943 (R. 8).

And in considering the application of the proposition that waiver will not be presumed from a guilty plea or from failure of the accused to demand counsel, as now established by *Johnson v. Zerbst, Walker v. Johnston,* and *Glasser v. United States, supra,* it is significant that neither the Nebraska Supreme Court, nor any of the authorities upon which it relied in the instant cases, suggested any distinction between the right of an accused in a state court as distinguished from a federal court.

In *Smith v. O'Grady,* 312 U. S. 329, 85 L. ed. 859, this Court had occasion to consider the practice prevailing in the Supreme Court of Nebraska in habeas corpus proceedings. In that case which was decided just one week after *Walker v. Johnston, supra,* and which case was cited in the opinion, there was a contention by the Attorney General that the petitioner under Nebraska law could not have his asserted rights determined in habeas corpus proceedings. Commenting on this contention, this Court said:

> "Moreover, while the opinions of the Nebraska courts do not mark clearly the exact boundaries within which Nebraska confines the historic remedy of habeas corpus, the Nebraska Supreme Court has held that the writ was properly invoked to obtain release from imprisonment resulting from deprivation of constitutional rights. Because of this, and because a contrary conclusion would apparently mean that Nebraska provides no judicial remedy whatsoever for petitioner even though he can show he is imprisoned in violation of procedural safeguards

> commanded by the Federal Constitution, we are unable to reach the conclusion that habeas corpus is unavailable to him under Nebraska law."

In *Smith v. O'Grady, supra,* the application for the writ included allegations of a refusal of the petitioner's request for the assistance of counsel. As to the allegations of the petitioner, and the decision of the district court in Nebraska that the petition stated no cause of action, this Court said:

> "If these things happened, petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guaranties protected against state invasion through the Fourteenth Amendment. The state court erroneously decided that the petition stated no cause of action. If petitioner can prove his allegations the judgment upon which his imprisonment rests was rendered in violation of due process and cannot stand."

Special significance attaches to the opinion in *Smith v. O'Grady, supra,* in connection with the right of the petitioner in the instant case, by reason of the observations of the Eighth Circuit Court of Appeals in the case of *Boyd v. O'Grady,* 121 Fed. 2d 146. In this case the accused had been arraigned and pleaded guilty in the District Court of Douglas County, Nebraska. He later filed a petition for a writ of habeas corpus in the District Court of the United States for the District of Nebraska, which included allegations that he had no means to hire a lawyer and did not know that he was entitled to the assistance of counsel. There were also allegations of coercion, and of a refusal to call a lawyer when requested after sentence had been imposed. The record showed that a petition for a writ of habeas corpus had pre-

viously been filed and dismissed in the District Court of Lancaster County, Nebraska. One of the objections filed in the federal district court by the warden of the penitentiary was that the petitioner had not exhausted his remedies in the state court and did not show peculiar urgency to justify the intervention of the federal court. The federal district court sustained the objection that the petition did not present a case where federal intervention was justified.

On the appeal to the Eighth Circuit Court of Appeals the petitioner contended at the time his petition was presented to the District Court of Lancaster County, in September, 1940, the practice of habeas corpus proceedings in Nebraska under the decisions of the Supreme Court of Nebraska was such that the appellant could not, as a practical matter, obtain a complete judicial hearing upon his claim that he had been wrongfully denied the assistance of counsel. He contended that any appeal to the Supreme Court of Nebraska would be unavailing because that court had repeatedly held that a waiver of the constitutional right of an accused to have counsel would be implied where an accused being without counsel, fails to demand that counsel be assigned him and pleads guilty. The cases referred to in the opinion of the Eighth Circuit Court of Appeals as illustrating the attitude of the Supreme Court of Nebraska are the same two cases which were relied on by the Supreme Court of Nebraska in its opinion in the instant case[16] (R. 14).

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16 *Alexander v. O'Grady*, 137 Neb. 645, 290 N. W. 718.
Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82.

The Eighth Circuit Court of Appeals in reversing the judgment and remanding the cause cited the cases of *Johnson v. Zerbst, supra.* And the Eighth Circuit Court of Appeals expressed the expectation that Nebraska procedure in habeas corpus would be conformed to the pronouncements of the Supreme Court of the United States. In fact, however, Nebraska procedure has not been conformed to the pronouncements of the Supreme Court of the United States, particularly with respect to the implication of waiver of the right to the assistance of counsel from a plea of guilty, as is illustrated by the opinion of the Supreme Court of Nebraska in the instant case (R. 14).

The non-conformity of Nebraska procedure with the pronouncements of the Supreme Court of the United States is made clear by the following language in *Boyd v. O'Grady, supra:*

> "We think it must be inferred from the decisions of the Supreme Court of Nebraska in Alexander v. O'Grady and Davis v. O'Grady, supra, and from the action of the Supreme Court of the State in Smith v. O'Grady, supra, and from the state court's summary denial of the petition for habeas corpus in this case, that at least up to the time of the decision in Smith v. O'Grady in February of this year, the Nebraska courts when considering petitions for habeas corpus did not give to the Nebraska statute requiring assignment of counsel to one accused of a penitentiary offense the same effect as the federal courts are required to give to the assistance of counsel clause of the Sixth Amendment in habeas corpus cases before them. It is at best doubtful whether the Nebraska courts would, before Smith v. O'Grady, supra, have granted ha-

beas corpus to a person sentenced on a plea of guilty but without counsel upon proof aliunde that the waiver of counsel, implied by the plea, had not been intelligently and completely made, and it is made clear in Smith v. O'Grady, supra, that the procedural guarantee of the Sixth Amendment to the federal constitution is protected against State invasion through the Fourteenth Amendment.

"It follows that this petition for habeas corpus presented to the federal judge the rare case and peculiar urgency where the petitioner had no fair prospect of securing full and complete protection of the rights guaranteed by the federal constitution through habeas corpus proceedings in the State courts, even by appeal to the court of last resort in the State. He had been confined in the jail and penitentiary more than twenty months upon a sentence of twenty-nine months (allowing for good time) and could not hope for relief by the process of appeal through the State Supreme Court to the United States Supreme Court within the period of the sentence. Although the Nebraska procedure in habeas corpus will doubtless be conformed to the pronouncement of the Supreme Court in Smith v. O'Grady, supra, it had not been at the time this petition for the writ was presented, and we think the federal judge ought not to have declined to consider it. It states a cause of action and the evidence should be heard."

It would seem also that the language quoted above has special significance in showing that Nebraska procedure does not conform to the pronouncements of this Court in view of the fact that two of the three Circuit Judges before whom the case of *Boyd v. O'Grady, supra,* was heard are eminent members of the Nebraska bar. The opinion was written by Honorable Joseph W. Woodrough, who for many years was a Judge of the District

Court of the United States for the District of Nebraska. Also a member of the Eighth Circuit Court of Appeals hearing the case of *Boyd v. O'Grady, supra,* was Honorable Harvey M. Johnsen, who was a Justice of the Supreme Court of Nebraska at the time the cases were submitted and the opinions rendered in *Alexander v. O'Grady,* 137 Neb. 645, 290 N. W. 718, and *Davis v. O'Grady,* 137 Neb. 708, 291 N. W. 82.

That the procedure in Nebraska at the present time does not conform to the pronouncements of the Supreme Court of the United States with respect to waiver of the right of assistance of counsel is shown by the dictum in the recent case of *Ex parte Tail,* 16 N. W. 2d 161, decided October 20, 1944, the opinion in which case again states that a waiver will be implied where an accused fails to demand that counsel be assigned him, citing *Alexander v. O'Grady, supra, Davis v. O'Grady, supra,* and also the opinion of the Supreme Court of Nebraska in the instant case. In the case of *Ex parte Tail,* however, it appeared from the journal of the judgment of the District Court that counsel had in fact been appointed.

In concluding this portion of the argument it is appropriate to call attention also to two other cases involving habeas corpus very recently decided by the Supreme Court of Nebraska, namely, *Williams v. Olson,* 16 N. W. 2d 178, and *Hawk v. Olson,* 16 N. W. 2d 181, both decided November 3, 1944. In *Hawk v. Olson, supra,* the Supreme Court of Nebraska found that many of the petitioner's grounds for release were pleaded in the form of conclusions, and in both *Hawk v. Olson, supra,* and *Ex parte Tail, supra,* the Supreme Court of Nebraska ap-

parently declined to consider statements of conclusions. The case of *Williams v. Olson, supra,* involved a question of the application of the doctrine of res judicata to habeas corpus proceedings, holding that the principle of res judicata applies in cases of habeas corpus where there had been a hearing upon the merits in a former action of the same kind, and where in a second petition filed for a writ of habeas corpus it affirmatively appears that such petition is based upon the same reasoning and facts and does not contain a new state of facts different from that which existed at the time the first judgment was rendered.[17]

The tendency to apply strict rules of pleading, which is suggested in *Ex parte Tail, supra,* and at the same time to deny a later application for a writ of habeas corpus, which may not contain a new state of facts, on grounds of res judicata, presents a situation whereby one who is imprisoned risks his assertion of fundamental rights upon one petition for a writ which he, being imprisoned, is not always in a position to have prepared by most expert counsel.

While it does not appear in the instant case that there was any hearing on the similar petition, previously filed and dismissed in the District Court of Lancaster County, the attitude of the Supreme Court of Nebraska with respect to habeas corpus proceedings as illustrated by its various decisions, including the three cases last

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17 In the case of *Waley v. Johnston*, 316 U. S. 101, 86 L. ed. 1302, it was stated: "The principle of res judicata does not apply to a decision on habeas corpus refusing to discharge a prisoner." However, in that case it appeared that there was no hearing on the allegations of an earlier application for a writ of coram nobis.

above cited, has prompted the petitioner, Richard Rice, in the instant case to urge upon his counsel appointed by the Supreme Court of the United States, that the Supreme Court of the United States should issue the writ of habeas corpus in the instant case, for the reason that it would be a useless formality to remand the case to the courts of Nebraska, in view of their decisions.

It is in fact the attitude of the petitioner himself in the instant case that, within the language of *Smith v. O'Grady, supra,* Nebraska provides no judicial remedy whatsoever for the petitioner even though he can show he is imprisoned in violation of procedural safeguards commanded by the Federal Constitution. While this Court said in *Smith v. O'Grady, supra,* that it was "unable to reach the conclusion that habeas corpus is unavailable" under Nebraska law, counsel appointed for the petitioner in this case desires to make it unequivocally plain that one of the contentions of the petitioner himself is that the decisions of the Supreme Court of Nebraska in habeas corpus cases have resulted in a situation wherein this petitioner is wholly without any available remedy in a Nebraska court for the protection of his rights under the Federal Constitution. In the instant case it must be remembered that no pleading was filed on behalf of the Attorney General, and that the conclusions reached by both the District Court of Lancaster County and the Supreme Court of Nebraska were based upon the allegations of the plaintiff's petition as uncontroverted in the record. It is suggested, therefore, that it is a fair inference that the sole question presented is the sufficiency of the allegations, and that, if held to be sufficient, the writ should be issued forthwith.

Taking into account that this petitioner is a ward of the Federal Government, and the further circumstance that it appears from the record that he is imprisoned under a sentence for a crime for which under the Federal Penal Code he is subject to trial and penalty under the exclusive jurisdiction of the United States, it is respectfully urged that the case here presented is one wherein this petitioner's constitutional rights should properly be finally determined in the Supreme Court of the United States in this present proceeding.

II.

THE PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE GRANTED BECAUSE THE STATE COURT HAD NO JURISDICTION TO PROCEED TO JUDGMENT AGAINST THE PETITIONER.

An Indian committing the crime of burglary on an Indian Reservation is subject to trial exclusively in the federal courts.

The petitioner's application for a writ alleged that he is a Winnebago Indian by birth a resident of Winnebago, Nebraska, a Ward of the Federal Government (R. 2); that he is an Indian of the Winnebago Tribe located in the State of Nebraska, Thurston County, Nebraska (R. 6); that the alleged crime was committed on "an indian Reservation Government property" without and beyond the Jurisdiction of the Trial Court (R. 5). The information charged that the petitioner with one Joe Bigbear did feloniously and forcefully break and enter into a certain dining hall in the Village of Winnebago in Thurston County, Nebraska, and that said dining hall is owned by the Winnebago Indian Mission of the Reform Church

in America, with the intent to steal property of the "valuse" contained in said building (R. 3). The Journal Entry of the District Court of Thurston County, Nebraska, stated that the petitioner was "arraigned upon the information filed herein for burglary" (R. 4).

By reason of these circumstances, the petitioner contends that he has been deprived of his constitutional rights, in that there was no jurisdiction in the state courts of Nebraska to try and convict him for the crime of burglary.

Section 328 of the Criminal Code of the United States, (being Title 18 U. S. C. A. section 548) provides as follows:

> "All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within any Indian reservation under the jurisdiction of the United States Government, including rights-of-way running through the reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and be subject to the same penalties as are all other persons *committing any of the above crimes within the exclusive jurisdiction of the United States* * * * ". (Italics supplied.)

It is true that the record is silent as to the genealogy of the petitioner and also as to any more definite legal description of the place of the crime than as above set forth. It is, however, common knowledge in Nebraska that the Winnebago Indian Reservation is located in Thurston County, and that the office of the Indian

Agency is located at or close to the Village of Winnebago. In fact all of Thurston County is included within either the Omaha Reservation or the Winnebago Reservation.— The boundaries of Thurston County as defined in Section 25-191 of the 1929 Compiled Statutes of Nebraska[18] disclose this fact. And the statutory boundaries of Dakota County, Nebraska, immediately adjacent to Thurston County on the North, which are described in Section 25-124[19] of the 1929 Compiled Statutes of Nebraska also make reference to the North line of the Winnebago Indian Reservation as being the North line of Thurston County; and the statutory boundaries of Burt County, Nebraska, which is adjacent to Thurston County on the south, which boundaries are described in Section 25-113[20] of the 1929 Compiled Statutes of Nebraska, refer to the South boundary of The Omaha Indian Reservation. Historically, the Winnebago Reservation was established by a treaty dated March 6, 1865, by which the leading men of the Omaha Tribe of Indians, already located on the present Omaha Reservation, agreed to sell part of their reservation to the United States in order that a Reservation for the Winnebagos might then be created, and the Winnebagos have a heritage and home upon soil of their own.[21]

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18 The provisions of the statute are set forth in the Appendix to this Brief, together with reference to various treaties with the Omaha and Winnebago Tribes.

19 The section is set forth in full in the Appendix.

20 The section is set forth in full in the Appendix.

21 Vol. 1, History of Nebraska, pages 113-122, by Addison Erwin Sheldon, Ph.D., who is also Author of Articles on Nebraska in the Encyclopaedia Britannica. See also reference to the treaties in the Appendix to this brief.

Further, the Supreme Court of Nebraska did not base its decision with respect to the question of jurisdiction on any doubt as to the facts as alleged, but replied to the contention of the petitioner that he should have been tried under the exclusive jurisdiction of the Federal Government, with the following language:

> "It is also claimed in the petition that the petitioner is a Winnebago Indian and is under the exclusive jurisdiction of the federal government, and without the jurisdiction of the District Court of Nebraska. However, Chapter 15, Title 18, U. S. C. A., Sec. 548, of the Federal Penal Code, provides generally that all Indians committing a crime, either within or without an Indian reservation within the boundaries of a state, shall be subject to the same laws, and tried in the same courts, and subject to the same penalties as all other persons." (R. 13, 14.)

The opinion of the Supreme Court of Nebraska in referring to Section 548 omits the language "committing any of the above crimes within the exclusive jurisdiction of the United States." These are the words italicized in the quotation of the statute above. The omission of these words in the paraphrasing of the statute by the Supreme Court of Nebraska completely alters the meaning thereof. The federal statute provides that Indians committing the designated crimes within the limits of an Indian reservation and within the boundaries of a state shall be tried in the same courts and in the same manner as all other persons committing such crimes within the exclusive jurisdiction of the United States. The limitation of the words "committing any of the above crimes within the exclusive jurisdiction of the United States" cannot be disregarded without completely changing the obvious meaning of the statute. With reference to the

designated crimes, when committed by Indians on Indian reservations the statute clearly does not provide that the Indian shall be tried in the same courts as all other persons, which is the Supreme Court of Nebraska's interpretation of the statute, but rather the statute provides that Indians under such circumstances shall be tried in the same courts as all other persons who are within the exclusive jurisdiction of the United States.

In the recent case of Ex parte Tail, *Tail v. Olson*, 16 N. W. 2d. 161, decided by the Supreme Court on October 20, 1944, in which the Supreme Court of Nebraska affirmed the judgment denying an application for a writ of habeas corpus by a prisoner serving a sentence for second degree murder, the Supreme Court of Nebraska reiterated its interpretation of the statutory provision quoted above, saying:

> "However, Chapter 15, Title 18, U. S. C. A. Section 548 of the federal penal code vests such jurisdiction in the state courts. See in re Application of Rice (Rice v. Olson), 144 Neb. ——, 14 N. W. 2d. 850."

The statute above quoted has been the subject of construction on several occasions in this Court. An early construction is in *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228. As originally enacted the section of the statute above quoted contained two distinct definitions of the conditions under which Indians may be punished for the designated crimes. The first sentence of the section concerned offenses committed within the limits of a territorial government. The second sentence of the section concerned offenses committed within the limits of a state. The second sentence was amended in 1932 to include the

words "including rights-of-way running through the reservation," but otherwise remains unchanged from the language as discussed in *United States v. Kagama, supra.* Referring to offenses committed within the limits of a State, this Court said, in *United States v. Kagama, supra*:

> "The second is where the offense is committed by one Indian against the person or property of another, within the limits of a State of the Union, but on an Indian Reservation. In this case, of which the State and its tribunals would have jurisdiction if the offense was committed by a white man outside an Indian Reservation, the courts of the United States are to exercise jurisdiction as if the offense had been committed at some place within the exclusive jurisdiction of the United States. The first clause subjects all Indians, guilty of these crimes committed within the limits of a Territory, to the laws of that Territory, and to its courts for trial. The second, which applies solely to offenses by Indians which are committed within the limits of a State and the limits of a Reservation, subjects the offenders to the laws of the United States, passed for the government of places under the exclusive jurisdiction of those laws, and to trial by the courts of the United States."

With reference to the ability of Congress to provide for the trial of Indians charged with committing the designated crimes on Indian Reservations within states, it is stated in the opinion in *United States v. Kagama, supra*:

> "The statute itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. The Congress *has* done this, and *can*

do it, with respect to all offenses relating to matters to which federal authority extends."

Clearly this Court in *United States v. Kagama, supra*, was not discussing a statute which, in the language of the Supreme Court of Nebraska, "provides generally that all Indians committing a crime, either within or without an Indian reservation within the boundaries of a State, shall be subject to the same laws and tried in the same courts, and subject to the same penalties as all other persons."

Prior to the instant case, the Supreme Court of Nebraska did not construe that section of the Federal Penal Code as providing that all Indians committing a crime within or without an Indian reservation might be subject to the jurisdiction of the state courts. In *Kitto v. State* 98 Neb. 164, 152 N. W. 380, the Supreme Court of Nebraska held that a Santee Sioux Indian was properly convicted in a state court of an assault on another Indian within an Indian reservation. Assault is not one of the crimes designated in the section. In that case the defendant was contending that the offense was within the exclusive jurisdiction of the courts of the United States. In holding that the state court had jurisdiction, the Supreme Court of Nebraska said, referring to the section of the statute quoted above:

> "That the United States government has full and absolute control of its territories, reservations, and Indian wards cannot be questioned. If, therefore, the offense with which the defendant stands charged is one which Congress has reserved to the United States government the right to punish, and the jurisdiction over which it has reserved to the federal courts, then the district court was without jurisdiction. Otherwise its jurisdiction must be upheld."

Of special interest in connection with the case of *United States v. Kagama* is the opinion of the Supreme Court of Nebraska in *Ex parte Cross*, 20 Neb. 417, 30 N. W. 428. This was a petition for a writ of habeas corpus by a Winnebago Indian who had been accused of stealing a horse. The petition alleged that the alleged crime was committed on the reservation. A general demurrer was filed to the petition.

The Supreme Court of Nebraska entered judgment striking the case from the docket, with the following comment:

> "The case was presented by counsel, who had given the subject careful attention, and who displayed quite a considerable degree of ability in the argument, and in the preparation of briefs. But soon after the submission it was made known to the court that the restraint had been removed, and the petitioner was no longer held a prisoner, and the further consideration of the case was abandoned, the cause still remaining on the docket. Since the question here involved has been decided by the supreme court of the United States in an opinion written by Judge Miller, of that court, and filed on the tenth day of May, 1886, we deem it proper to refer to that decision as being the holding of the court of last resort, and possessing appellate jurisdiction over this court upon the question presented, and thus dispose of the case. See United States v. Kagama, 6 Sup. Ct. Rep. 1109. In that case it was held that the state courts have no jurisdiction over the Indians within the state, and on their reservations, for crimes committed by and against each other, so long as they maintain their tribal relations. It is true that the decision is based upon an act of congress passed after the arrest of the petitioner, and therefore might not be decisive of the question involved in this case, did one

> exist, yet as it declares the law as it is and has been since the taking effect of the act, to-wit, March 3, 1885, and is now, by the terms of the act and the construction given it by the highest court of the nation, the law of the land, we acknowledge its authority. We also fully approve of the reasoning of the learned judge who wrote the opinion."

In *State v. Campbell*, 53 Minn. 354, 55 N. W. 553, the Supreme Court of Minnesota held that Indians committing the crimes designated in the statute above quoted were not subject to the criminal laws of the state, saying:

> "By the act of 1885, presumably, congress has enumerated all the acts which in their judgment ought to be made crimes when committed by Indians, in view of their imperfect civilization. For the state to be allowed to supplement this by making every act a crime on their part which would be such if committed by a member of our more highly civilized society would be not only inappropriate, but also practically to abrogate the guardianship over these Indians which is exclusively vested in the general government."

In *People v. Daly*, 212 N. Y. 183, 105 N. E. 1048, the New York Court of Appeals considered a petition for a writ of habeas corpus by an Indian who was being held in the county jail of Niagara County to await action of the grand jury on a charge of assault with intent to kill, committed within the boundaries of the reservation of the Tuscarora Tribe. The petitioner contended that he was subject to trial only in a United States court. The New York Court of Appeals, in holding that the jurisdiction of the state court must give way before the higher authority which the statute above quoted vests in the federal court, said:

> "The statute confers upon the federal courts jurisdiction of the enumerated crimes committed by an Indian 'within the boundaries of any state of the United States, and within the limits of *any* Indian reservation.' We are not at liberty to limit this broad language, unless we find somewhere in the statute or its history the indication of an intent that it should be limited, and we have found none."

In some of the cases involving the statutory provision above quoted, other circumstances have been urged as affecting the exclusive jurisdiction of the federal courts, but the authorities have consistently held that an Indian committing one of the designated crimes on an Indian reservation is subject exclusively to the jurisdiction of the federal courts.

Thus in *United States v. Celestine*, 215 U. S. 278, 54 L. ed. 195, where both the defendant and the woman whom he was accused of murdering held patents from the United States and it was claimed that they were citizens of the United States, this Court said:

> "But, although made a citizen of the United States and of the state, it does not follow that the United States lost jurisdiction over him for offenses committed within the limits of the reservation."

In *State v. Columbia George*, 39 Ore. 127, 65 Pac. 604, where the defendant had been convicted of murder in the Circuit Court of Oregon, and was an allottee of land on the United States Indian Reservation in Umatilla County, Oregon, the Supreme Court of Oregon in reversing the judgment and remanding the cause with directions to discharge the defendant, because of lack of jurisdiction in the state court, said:

"The state courts have never had jurisdiction over the Indians within the Indian country or upon Indian reservations, except as and insofar as the general government has relinquished the supervisory control and authority over them. The acts under consideration are not indicative of such a purpose; hence it follows that the state court is without jurisdiction of the offense charged."

This opinion of the Supreme Court of Oregon was commended by Mr. Chief Justice Fuller in *Toy Toy v. Hopkins*, 212 U. S. 542, 53 L. ed. 644, where, in an appeal from a conviction in federal court, in connection with the same circumstances, this Court reached the same conclusion with respect to the exclusive jurisdiction of federal courts.

In the opinion in *State v. Columbia George, supra*, there is quoted an opinion of the Federal Circuit Court of Nebraska, in the case of *United States v. Flournoy Live-Stock & Real-Estate Co.*, 71 Fed. 576, where the following significant statement is made with particular reference to the Omaha and Winnebago Reservations in Nebraska:

"I further hold that these reservations continue to be Indian reservations; that the United States has never yet been released from the treaty stipulations and obligations by which it assumed to preserve these lands for the use and benefit of the Indians; that the United States holds the title of these lands charged with the trust created by the treaties in question, and it is its duty to do whatever is necessary to protect the Indians in the proper use and occupancy thereof; that the power and right in the United States to do whatever is necessary for the fulfilment of its treaty duties, trusts and obli-

gations towards the Indians rests upon every foot of soil and upon every individual within the boundaries of the reservations, and this power and right is paramount and supreme."

Again, in *United States v. Thomas*, 151 U. S. 577, 38 L. ed. 276, the question was whether a murder committed by an Indian on a section numbered 16, a school land section, on an Indian reservation in Wisconsin, was subject to the exclusive jurisdiction of the United States. And this Court, in holding that the federal court had jurisdiction, said:

> "But independently of any question of title, we think the court below had jurisdiction of the case. The Indians of the country are considered as the wards of the nation, and whenever the United States sets apart any land of their own as an Indian reservation, whether within a state or territory, they have full authority to pass such laws and authorize such measures as may be necessary to give to these people full protection in their persons and property, and to punish all offenses committed against them or by them within such reservations."

In considering these authorities, the following observation of the Supreme Court of Nebraska in *Wollmer v. Wood*, 119 Neb. 248, 228 N. W. 541, in a case involving a mortgage foreclosure and title to real estate, is significant:

> "As a necessary rule of construction it may also be said: 'From the time of Worcester v. Georgia, 6 Pet. 515, 582, 8 L. ed. 483, down to United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, it has been the rule of all courts to construe doubtful legislation in favor of the Indian.' Rider v. La-Clair, 77 Wash. 488, 138 P. 3, 4."

It is in contradiction to these authorities set forth above that the Attorney General argued in his brief before the Supreme Court of Nebraska in the instant case, that:

> "Even if he had tribal status or was an allottee of federal lands the crime of burglary of which he stood charged is specifically included as a crime punishable by our state courts", (referring to the section of the statute quoted at the beginning of this portion of the argument).

And the holding by the Supreme Court of Nebraska in the instant case, that the Federal Penal Code provides generally that all Indians committing a crime either within or without an Indian reservation within the boundaries of a state, shall be subject to the same laws, and tried in the same courts, and subject to the same penalties as all other persons (R. 13, 14), seems also to be in direct conflict with the authorities above cited.

The petitioner in the instant case was sentenced on October 14, 1940 for a period of from one to seven years at hard labor in the penitentiary of the State of Nebraska (R. 4, 5). The record shows tha. for more than two years, he has consistently tried to assert his alleged constitutional rights. If he was in fact subject to trial exclusively in a federal court, there would seem to be no question but that he is entitled to the constitutional rights specially safeguarded in the United States Constitution for those brought to trial in federal courts, and would not, therefore, be in the position of raising questions of his constitutional rights only under those provisions of the United States Constitution which safeguard rights in state courts. The record shows that he

did not have the assistance of counsel whereby he might have presented the contention that he was subject exclusively to the jurisdiction of a federal court. In the face of these circumstances, and the argument above, it is little wonder that this petitioner himself has vigorously urged upon his appointed counsel that the substance of the matter to be determined is whether or not the petitioner is left remediless in the state courts of Nebraska, and that it is incumbent upon the Supreme Court of the United States to issue the writ of habeas corpus, for the reason that it would be a useless formality to remand the case to the courts of Nebraska.

The prayer of the petitioner's petition for writ of certiorari respectfully asks that this Honorable Court issue a writ of certiorari to review the order, judgment and opinion of the Supreme Court of Nebraska, that its judgment be reversed, and that the prayer for a petition for writ of habeas corpus be sustained. As counsel appointed by this Court, after the filing of the petition for writ of certiorari and brief in support thereof, we cannot emphasize too strongly the position of the petitioner, as communicated to his appointed counsel, that he seeks in this case to have the judgment of the Supreme Court of Nebraska reversed, and that the Supreme Court of the United States issue the writ of habeas corpus.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment of the Supreme Court of Nebraska be reversed, and that the prayer of the petitioner

for a writ of habeas corpus, in protection of his fundamental rights under the Federal Constitution, be granted.

BARTON H. KUHNS,

Counsel for Richard Rice, Petitioner.

January, 1945.

APPENDIX

Section 25-191 of the 1929 Compiled Statutes of Nebraska defines the boundaries of Thurston County as follows:

"The territory bounded as follows shall constitute the county of Thurston: Commencing at a point where the west boundary of the Omaha Indian reservation intersects the south line of section thirty-three, (33) township twenty-five, (25) north, of range five, (5) east, 6th principal meridian; thence east to the northeast corner of township twenty-four, (24), north, of range seven (7) east; thence south to the south line of the Omaha Indian reservation as originally surveyed; thence east along said line to the line between sections thirty-two and thirty-three, township twenty-four (24) north, of range ten (10) east; thence north to the northwest corner of section twenty-one (21), township twenty-four, (24) north, of range ten (10) east; thence east to the eastern boundary of the State of Nebraska; thence in a northwesterly direction along said boundary line to its intersection with the north line of the Winnebago Indian reservation, township twenty-seven (27) north, of range nine, (9) east; thence west along the north line of said reservation to the intersection of the line between sections thirty-three and thirty-four, township twenty-seven (27) north, range six (6) east; thence south to the south-west corner of section thirty-four, (34) township twenty-seven, (27) north, range six (6) east; thence west to an intersection with the west boundary of said Winnebago Indian reservation; thence south along the Winnebago and Omaha Indian reservation line to the place of beginning."

Section 25-124 of the 1929 Compiled Statutes of Nebraska defines the boundaries of Dakota County as follows:

"The county of Dakota shall for all purposes be composed of the territory contained within the following boundaries, to-wit: Commencing at the most westerly point where the township line between townships twenty-nine, and thirty, north, intersects the state boundary line; thence west along said line to the northwest corner of section three, in township twenty-nine, north, of range six, east; thence south by section lines to the north line of the old Winnebago Indian reservation, now the north line of Thurston county; thence east along the north line of said Indian reservation, and the north line of Thurston county, to the state boundary line in the channel of the Missouri river; thence northerly along said state boundary line to the point where said boundary line is intersected by the east boundary line of the State of South Dakota; thence westerly along the middle of the main channel of the Missouri river as agreed upon as the boundary line between the States of Nebraska and South Dakota by the boundary commissions of said states provided for by the legislatures thereof during the sessions of 1903, and as shown by the reports of said commissions now on file, and approved by the legislatures of 1905, to the place of beginning, excluding from said county of Dakota, all that territory formerly within said county, which by said commissioners and their said report is given to the State of South Dakota and specially including within Dakota county all the territory which was formerly South Dakota, which by said commissioners and their said reports is given to the State of Nebraska."

Section 25-113 of the 1929 Compiled Statutes of Nebraska defines the boundaries of Burt County as follows:

"The territory bounded as follows: Commencing at a point where the north line of sections twenty-

one, twenty-two, twenty-three, and twenty-four, of township twenty-four, north, of range ten, east of sixth principal meridian intersects the east boundary line of the State of Nebraska; thence west along said section lines to the northwest corner of said section twenty-one; thence south along the west line of said sections twenty-one and twenty-eight to the south boundary line of Omaha Indian reservation; thence west on the south boundary line of said reservation to the line dividing ranges seven and eight east; thence south by said line to the south line of township twenty-one, north, of range eight, east; thence east by said line to the northeast corner of section six, in township twenty, north, of range nine, east; thence south by section lines one mile east of the guide meridian to the southwest corner of section twenty, in township twenty, north, of range nine, east; thence east by section lines to the state boundary; hence northwardly up said boundary to the place of beginning, shall constitute the county of Burt."

By a treaty of March 16, 1854, found in 10 United States Statutes at Large, 1043, between the United States of America and the Omaha Tribe of Indians, the Omaha Tribe ceded to the United States all their lands west of the Missouri River and south of a line drawn due west from a point in the center of the main channel of said Missouri River due east of where the Ayoway River "disembogues" out of the bluffs, to the western boundary of the Omaha country. This treaty reserved to the Omaha Tribe of Indians the land north of that which was ceded, and to which they agreed to move within the period of a year.

APPENDIX (Continued)

In 12 United States Statutes at Large, page 658, is an Act for Removal of the Winnebago Indians, and for the sale of their Reservation in Minnesota for their Benefit, which was approved February 21, 1863.

In 14 United States Statutes at Large, page 667, is the treaty between the United States of America and the Omaha Tribe of Indians, whereby the United States purchased from the Omaha Tribe of Indians a portion of the Omaha Reservation, which later became the Winnebago Reservation. In this treaty the portion purchased is described as:

> "Commencing at a point on the Missouri River four miles due south from the north boundary of the present Omaha Reservation, thence west ten miles, thence south four miles, thence west to the western boundary line of the Reservation, thence north to the northern boundary line, thence east to the Missouri River, and thence south along the River to the place of beginning."

This treaty was concluded March 6, 1865, ratification was advised February 15, 1866.

In 14 United States Statutes at Large, page 671, is the treaty between the United States of America and the Winnebago Tribe of Indians, whereby the land purchased from the Omaha Tribe became the Winnebago Reservation. This treaty was concluded March 8, 1865, ratification was advised with amendment on February 13, 1866, the amendment was accepted on February 20, 1866, and the treaty was proclaimed on March 28, 1866. (The amendment provided that the Winnebago Indians should

receive 400 horses instead of 60 horses as provided in the original treaty.)

All of the above treaties and the statutory provision with respect to the removal of the Winnebago Indians from Minnesota were, of course, dated prior to the admission of Nebraska as one of the United States of America in 1867.

Regardless, therefore, of any question as to the exact title of the particular property on which the alleged crime was committed, and which is described in the application for the writ of habeas corpus as "indian" Reservation Government property (R. 5), there can be no question as to the fact that the alleged crime was committed within the boundaries of the Winnebago Indian Reservation, and, therefore, under the authorities cited in the brief, the alleged crime was under the exclusive jurisdiction of the United States.

No 391

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1944

RICHARD RICE, PETITIONER,

V.

NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF FOR THE RESPONDENT.

WALTER R. JOHNSON,
Attorney General of Nebraska,
H. EMERSON KOELZER,
Deputy Attorney General of Nebraska,
ROBERT A. NELSON,
Assistant Attorney General of Nebraska,
Counsel for Respondent.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1944

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Assistant Attorney General of Nebraska,
Counsel for Respondent.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

This case involves an application for a writ of habeas corpus made to the District Court of Lancaster County,

Nebraska. The petition was dismissed without the issuance of a writ and appeal taken to the Supreme Court of the State of Nebraska which affirmed the action of the lower court. Certiorari was granted by this court and the matter is now before the court on its merits.

NATURE AND STATEMENT OF CASE.

Counsel for petitioner has set forth in his statement of the case the allegations of the petition for a writ of habeas corpus. Since no hearing was had in this matter, and the relief, if any, to which petitioner is entitled must be based upon the facts set forth in his petition, we wish to review herein the facts pleaded, which it is contended show that the conviction and commitment of petitioner is without authority of law.

The errors relied upon and argued in petitioner's brief can be summarized under two points. The first contention being that petitioner was denied due process of law, as guaranteed by the Fourteenth Amendment to the Constitution, in that no counsel was appointed to represent him at the time he plead guilty before the trial court, and the second contention that petitioner, being an Indian, the crime for which he was tried and convicted is one for which he was subject to trial and penalty only in a federal court.

The petition alleges the following facts which have a bearing on the questions at issue: That on the 22nd day of May, 1940, an information was filed in the District Court of the Eighth Judicial District of Nebraska, in and for Thurston County, Nebraska, charging petitioner and one Joe Bigbear with breaking and entering into a certain dining hall in the Village of Winnebago, in Thurston

County, Nebraska, which said dining hall was owned by the Winnebago Indian Mission of the Reformed Church in America, with the intent of petitioner and the said Joe Bigbear to steal property of value contained in said building. The petition sets out in full the information filed by the county attorney of Thurston County, Nebraska (R. 3).

It is further alleged that petitioner is an Indian of the Winnebago Tribe, located in Thurston County, Nebraska (R. 2-6); that the crime was committed on an "Indian Reservation Government property without and beyond the jurisdiction of the trial court" (R. 5).

Petition then states that thereafter, on the 14th day of October, 1940, petitioner was arraigned in the District Court of Thurston County, Nebraska, and said petition discloses that petitioner entered a plea of guilty; that the court read to him the section of the statute defining the crime with which he was charged and fixing the penalty therefor and asked him if knowing what penalty could be imposed upon him he still desired to plead guilty. The petition sets forth in full the journal entry of the court with reference to such arraignment, which is as follows (R. 4-5):

"IN THE DISTRICT COURT OF THURSTON COUNTY, NEBRASKA.

"THE STATE OF NEBRASKA, Plaintiff vs. Dick Rice, Defendant.

"No. 5173 *JOURNAL ENTRY*. Now on this 14th day of October, A. D. 1940, the same being one of the Judicial days of the October, A. D. 1940, term of said court: Defendant having waived a prelim-

inary hearing in the county court and now being brought before the court for arraignment upon the information; this cause came on for hearing upon the information filed herein. The state appearing by said County Attorney and the Defendant appearing in person. The Defendant was thereupon arraigned upon the information filed herein for burglary and after the same was read to him in open court, and he was asked how he pled thereto, to which he replied, 'Guilty.' The court thereupon read Section 28-538, C. S. 1929, Nebraska, and asked the Defendant, if after knowing what penalty could be inflicted upon him under his plea of guilty, he still desired to plead guilty, to which question of the court, he replied in the affirmative.

"Whereupon the Defendant was asked if he had anything to say why judgment should not be passed upon him; the Defendant replied that he had nothing to say.

"The statement of the County Attorney was then read.

"The Court thereupon passed judgment and sentence of the court upon the defendant, as follows: It is the judgment and sentence of the Court that you be confined in the penitentiary of the State of Nebraska, at hard labor, no part of which shall be in solitary confinement and Sundays and holidays excepted as to hard labor, for a period of from one (1), to seven, (7), years, and pay the costs of prosecution, and that you be committed to the custody of the Sheriff of Thurston County, Nebraska, who will see that you are conveyed to the above institution for execution of this sentence, BY THE COURT: *MARK J. RYAN* DISTRICT JUDGE 'Filed October 14, 1940; Moris Rasmussen, Clerk Dist. Court.'"

Petitioner further alleges that the trial court did not advise petitioner of his constitutional rights to the assistance of counsel and witnesses for his defense; nor the right to be charged and informed of the nature and cause of the accused by indictment or presentment of a grand jury guaranteed by the Fourteenth, Fifth and Sixth Amendments to the Constitution of the United States; nor the right to trial by jury guaranteed by Article I, Section 6, of the Constitution of Nebraska (R. 8).

Petitioner incorporates in his petition a large number of conclusions charging the illegality of his trial. For example, it is alleged that his trial, conviction and commitment are "based on a swift, reckless sham and pretence of a trial" (R. 1); that he was "illegally, unlawfully without jurisdiction or authority of law arraigned in the District Court of Thurston County, Nebraska;" that the conviction of petitioner was "obtained by ordeal and mobocracy" (R. 7). These latter statements are mere conclusions of the pleader and cannot be considered unless they are borne out by the facts, as set forth in the petition.

SUMMARY OF POINTS AND ARGUMENT.

Point A. The constitutional right of the accused in a criminal case to have the assistance of counsel may be waived.

Point B. The determination of the Supreme Court of Nebraska that the trial and conviction of petitioner was not illegal under the state's constitution and laws may not be reviewed by the Supreme Court of the United States.

Point C. In prosecutions for crimes against state law the constitutional guarantees are those prescribed by state law, giving due regard to the Fourteenth Amendment to the Constitution of the United States forbidding the state to deprive the accused of life, liberty or property without due process of law.

Point D. An Indian who commits a crime on land within the boundaries of an Indian Reservation, but land to which the patent in fee has been issued, is subject to the jurisdiction of the courts of the state in which such land is located.

Point E. The ruling of a state court that a habeas corpus proceedings on the merits is conclusive in the matter therein contained, and that a second petition for habeas corpus, based upon the same reason and facts, is res judicata as to the second petition, does not violate the due process clause of the Fourteenth Amendment.

ARGUMENT.

Point A.

The Constitutional Right of the Accused in a Criminal Case to Have the Assistance of Counsel May be Waived.

Johnson v. *Zerbst*, (1938) 304 U. S. 458, 82 L. Ed. 1461, 58 Sup. Ct. 1019.

Zahn v. *Hudspeth*, (1939; C. C. A. 10th) 102 Fed. (2d) 759 (writ of certiorari denied in (1939) 307 U. S. 642, 83 L. Ed. 1522, 59 Sup. Ct. 1045).

Buckner v. *Hudspeth*, (1939; C. C. A. 10th) 105 Fed. (2d) 396 (writ of certiorari denied in

(1939) 308 U. S. 553, post, 465, 60 Sup. Ct. 99).

McCoy v. *Hudspeth*, (1939; C. C. A. 10th) 106 Fed. (2d) 810.

Wilson v. *Hudspeth*, (1939; C. C. A. 10th) 106 Fed. (2d) 812.

Cundiff v. *Nicholson*, (1939; C. C. A. 4th) 107 Fed. (2d) 162.

Towne v. *Hudspeth*, (1939; C. C. A. 10th) 108 Fed. (2d) 676.

McDonald v. *Hudspeth*, (1940; C. C. A. 10th) 108 Fed. (2d) 943.

Sedorko v. *Hudspeth*, (1940; C. C. A. 10th) 109 Fed. (2d) 475.

Cooke v. *Swope*, (1940; C. C. A. 9th) 109 Fed. (2d) 955.

Moore v. *Hudspeth*, (1940; C. C. A. 10th) 110 Fed. (2d) 386 (writ of certiorari denied in (1940) — U. S. —, post, —, 60 Sup. Ct. 1106).

Williams v. *Sanford*, (1940; C. C. A. 5th) 110 Fed. (2d) 526 (writ of certiorari denied in (1940) — U. S. —, post, —, 60 Sup. Ct. 1096).

Creel v. *Hudspeth*, (1940; C. C. A. 10th) 110 Fed. (2d) 762.

Pers v. *Hudspeth*, (1940; C. C. A. 10th) 110 Fed. (2d) 812.

Erwin v. *Sanford*, (1939; D. C.) 27 Fed. Supp. 892.

Parker v. *Johnston*, (1939; D. C.) 29 Fed. Supp. 829.

United States, ex rel. Coate v. *Hill*, (1939; D. C.) 29 Fed. Supp. 890.

Zewezubuck v. *Sanford*, (1939; D. C.) 32 Fed. Supp. 124.
Smythe v. *State*, 124 Neb. 267, 246 N. W. 261.

The right of an accused to have counsel appointed under the constitution and laws of the State of Nebraska is for the benefit of the accused, and, therefore, a right which may be waived. This also is true of the right to appointment of counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States, as shown by the authorities above set forth. While it is no doubt true that under certain circumstances the mere fact that the accused pleads guilty may not constitute an inelligent waiver of his right to counsel, a plea of guilty voluntarily made without any improper inducement and where no need for the assistance of counsel is disclosed, may properly be held to constitute a waiver of the appointment of counsel. The record in the instant case discloses that the plea of guilty was voluntarily made, the petition contains no allegation of any improper inducement, either on the part of the prosecuter, the court, or anyone else, but to the contrary the record of the court, which is made a part of the petition, discloses regularity in the proceedings in every manner. The judgment of a trial court of the State of Nebraska is entitled to a presumption of regularity. As stated in *Johnson* v. *Zerbst*, supra:

> "It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity."

Point B.

The Determination of the Supreme Court of Nebraska That the Trial and Conviction of Petitioner Was Not Illegal Under the State's Constitution and Laws May Not be Reviewed by the Supreme Court of the United States.

This point has been repeatedly decided by this court, and scarcely requires any argument. In *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, it is stated:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

In *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 82 L. Ed. 1290, this court said:

> "The decision in Erie R. Co. v. Tompkins * * * settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court."

In *Smith* v. *O'Grady*, 312 U. S. 329, 61 Sup. Ct. 572, 85 L. Ed. 859, paragraph 1 of the syllabus provides as follows:

> "The determination of the highest court of a state that the imprisonment of a petitioner for a writ of habeas corpus is not illegal under the state's Constitution or laws may not be reviewed by the Supreme Court of the United States."

Petitioner contends that in his trial there was a violation of that part of Article I, Section 2 of the Constitution of the State of Nebraska which provides:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, * * *."

The Supreme Court of Nebraska, however, has ruled adversely to the petitioner as to this contention, and the matter is therefore not before this court for review. The inquiry is limited to whether or not the failure to appoint counsel at the preliminary hearing of the petitioner constituted a violation of the provisions of the Fourteenth Amendment to the Federal Constitution.

Point C.

In Prosecutions For Crimes Against State Law the Constitutional Guarantees Are Those Prescribed by State Law, Giving Due Regard to the Fourteenth Amendment to the Constitution of the United States Forbidding the State to Deprive the Accused of Life, Liberty or Property Without Due Process of Law.

The authorities dealing with the question of whether or not failure to appoint counsel for the accused constitutes a violation of the provisions of the Federal Constitution are too numerous to all be set forth herein. A few of the more important of such cases are as follows:

Garrison v. *Amrine*, 155 Kan. 509, 125 Pac. (2d) 228. (Certiorari denied, 63 Sup. Ct. 51, 87 L. Ed. 509.)

Gall v. *Grady*, 39 Fed. Supp. 504, 125 Fed. (2d) 253.

Powell v. *Alabama*, 287 U. S. 45, 53 Sup. Ct. 55,

77 L. Ed. 158, 84 A. L. R. 527.

McCall v. *State*, 136 Fla. 343, 186 So. 667.

Smith v. *O'Grady*, 312 U. S. 329, 61 Sup. Ct. 572, 85 L. Ed. 859.

Johnson v. *Zerbst*, 304 U. S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461.

Walker v. *Johnston*, 312 U. S. 275, 61 Sup. Ct. 574, 85 L. Ed. 830.

Holiday v. *Johnston*, 313 U. S. 342, 61 Sup. Ct. 1015, 85 L. Ed. 1392.

Lowvorn v. *Johnston*, 118 Fed. (2d) 704. (Certiorari denied, 314 U. S. 607, 62 Sup. Ct. 92, 86 L. Ed. 488.)

Betts v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595.

The above cases definitely establish that the Sixth Amendment to the Federal Constitution is not applicable to prosecutions for crimes against state law, but applies only to prosecutions by federal courts. In prosecutions under state law the constitutional guarantees are those prescribed by the State Constitution, giving due regard to the Fourteenth Amendment forbidding the state to deprive the accused of life, liberty or property without due process of law. This distinction must be kept in mind in analyzing the various cases dealing with the failure to appoint connsel for the accused, for as stated in *Betts* v. *Brady*, supra:

> "The phrase 'due process of law' formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights; and its asserted denial is to be tested, not as a matter of rule, but rather by an appraisal of the totality of the facts involved in the particular case."

The State of Nebraska has fully recognized the obligation placed upon it by the provisions of the Fourteenth Amendment to the Federal Constitution, and, through the enactment of constitutional and statutory safeguards, have amply assured an accused of due process of law.

Section 3, Article I, Constitution of Nebraska, provides:

> "No person shall be deprived of life, liberty, or property, without due process of law."

Section 11, Article I, Constitution of Nebraska, provides:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Also, Section 29-1803, Revised Statutes of Nebraska 1943, provides for the appointment of counsel as follows:

> "When any person shall be indicted for an offense which is capital or punishable by imprisonment in the penitentiary, the court is hereby authorized and required to assign to such person counsel not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours. * * *"

It is also true, as suggested by counsel for petitioner, that in construing these constitutional and statutory provisions the Supreme Court of Nebraska has fully pro-

tected an accused in his right to be represented by counsel (Brief for Petitioner, pp. 19-24). This is fully demonstrated by the cases cited in petitioner's brief. *Smythe* v. *State*, 124 Neb. 267, 246 N. W. 461; *Bordeau* v. *State*, 125 Neb. 133, 249 N. W. 291; *Stagemeyer* v. *State*, 133 Neb. 9, 273 N. W. 824.

Counsel for petitioner suggests that it is difficult to reconcile with the above cases the failure to appoint counsel in the instant case. An analysis of the facts of the instant case, however, which we have set forth under the nature and statement of the case, pages 2 to 5 of this brief, discloses that such failure to appoint counsel is entirely consistent with the ruling in the cases above cited, as well as the holding of our court in the cases cited under Point A of this brief. While the petitioner alleges the conclusion that his trial was "based on a swift, reckless sham and pretence of a trial" (R. 4), that petitioner was "illegally, unlawfully without jurisdiction or authority of law arraigned in the District Court of Thurston County, Nebraska, tried and convicted in less than twenty (20) minutes" (R. 4), the facts show that petitioner was first informed against on the 22nd day of May, 1940 (R. 3), and that it was not until the 14th day of October, 1940, almost five months later, that he was arraigned before the district court and asked to plead to the information (R. 4). Following petitioner's plea of guilty, the court read Section 28-538, Compiled Statutes of Nebraska for 1929, the section under which he was informed against, and inquired of petitioner if after knowing what penalty could be inflicted upon him under his plea of guilty he still desired to plead guilty, to which question of the court he replied in the affirmative. Nowhere in the petition is there the least suggestion

that any threats or promises of immunity were made to the petitioner by either the prosecuting attorney, or the court, or anyone else, which caused him to plead guilty. Petitioner had almost five months to consider the matter from the time the information was filed against him until he was arraigned, and, when he appeared before the court stating he was guilty of the crime charged, certainly there was no need for the appointment of counsel. We have been unable to find any authority, either that cited by counsel for petitioner, or any other case which we have read, which have held that under similar circumstances the failure to appoint counsel constituted a denial of due process of law.

Two of the leading cases dealing with failure to appoint counsel in prosecutions for crimes committed against state law are *Powell* v. *Alabama*, supra, and *Smith* v. *O'Grady*, supra. A study of these cases will reveal, however, that in neither case was the mere failure to appoint counsel held to be a violation of due process, but this circumstance, together with all the other circumstances of the case, was held to deprive the defendant of due process.

In *Powell* v. *Alabama*, supra, it was held:

> "Failure to give reasonable time and opportunity to secure counsel prior to trial, to ignorant and illiterate youths, away from their families and friends, charged with a crime punishable with death, against whom popular hostility was so aroused that it was necessary to keep them closely confined and under military guard, infringes the due process clause of the Fourteenth Amendment."

Smith v. *O'Grady*, supra, was heard upon the allegations of the petition, which for the purpose of the hear-

ing had to be assumed to be true. With reference to these allegations, the court said:

> "For this petition presents a picture of a defendant, without counsel, bewildered by court processes strange and unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty. The petitioner charged that he had been denied any real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process; that because of deception by the state's representatives he had pleaded guilty to a charge punishable by twenty years to life imprisonment; that his request for the benefit and advice of counsel had been denied by the court; and that he had been rushed to the penitentiary where his ignorance, confinement and poverty had precluded the possibility of his securing counsel in order to challenge the procedure by regular processes of appeal. If these things happened, petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guaranties protected against state invasion through the Fourteenth Amendment."

In *Betts* v. *Brady*, supra, this court expressly held that the due process of law clause does not require that in every case, regardless of the circumstances, the state must furnish counsel to an accused who is without funds to employ counsel. In the opinion, the court said:

> "The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation

of the Fourteenth. Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.

"The petitioner, in this instance, asks us, in effect, to apply a rule in the enforcement of the due process clause. He says the rule to be deduced from our former decisions is that, in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the state. Expressions in the opinions of this court lend color to the argument, but, as the petitioner admits, none of our decisions squarely adjudicates the questions now presented."

The only reason given by petitioner for need of counsel is that such counsel would have been able to convince the trial court that it was without jurisdiction to hear the cause because the crime involved was committed by an Indian without the jurisdiction of the court. The question of jurisdiction of this cause will be considered in our next point which will disclose that this contention of petitioner is without merit.

Unless this court declares that a defendant in a criminal case must have counsel thrust upon him, the trial court made no error in failure to appoint counsel.

Point D.

An Indian Who Commits a Crime on Land Within the Boundaries of an Indian Reservation, But on Land to Which the Patent in Fee Has Been Issued, is Subject to the Jurisdiction of the Courts of the State in Which Such Land is Located.

Petitioner states that the crime for which he was convicted "was committed on an Indian Reservation Government property without and beyond the jurisdiction of the trial court." This is a false statement of fact, the falsity of which the trial court was required to take judicial notice.

It is a fact, as set forth in brief for petitioner, that the entire County of Thurston is included within the original Omaha Reservation and that a part of said original Omaha Reservation was sold by the Omaha Tribe by a treaty, dated March 6, 1865 (14 U. S. Stat. at L. 676), and a reservation established for the Winnebago Tribe in the same year (14 U. S. Stat. at L. 671). This treaty is set out in full in the appendix herein. It is also correct that the Village of Winnebago is located within the boundaries of said Winnebago Reservation.

The trial court was required to take judicial notice of the fact that Thurston County is one of the bodies politic of the State of Nebraska, duly organized, created and existing under and by virtue of the laws of the State of Nebraska; that it has a county government which has

functioned for many years, a county seat and a courthouse; that it has courts duly constituted by the laws of the state exercising civil and criminal jurisdiction, coextensive with the boundaries of the county, a jurisdiction which has been exercised unchallenged for many years. The right of equal suffrage is granted to Indians throughout the county. The court was further required to take judicial notice of the fact that there is very little land in Thurston County which has not been patented in fee, *and particularly was the trial court required to take judicial notice of the fact that the Village of Winnebago is incorporated under the laws of the State of Nebraska and is located in its entirety upon land which has been patented in fee.*

Viewed in this light, the petition discloses that the crime was committed upon land patented in fee and that the building broken into was owned by the Winnebago Indian Mission of the Reformed Church in America (R. 3). The petition, therefore, contradicts itself and discloses the falsity of the statement of petitioner that the crime was committed on "Indian Reservation Government property." The jurisdiction of the Federal Government in Thurston County exists only as to such property held by the government, either as the direct owner, or in trust for the Indians, which is a very small part of Thurston County. As to the balance of the territory within Thurston County, which includes the entire Village of Winnebago, the jurisdiction of the state courts is exclusive, both as to civil and criminal matters.

Jurisdiction in this case is granted to the State of Nebraska by the provisions of Section 6 of the General Allotment Act, passed February 8, 1887, 25 U. S. C. A.

349. A copy of this act with its amendments is set forth in the appendix herein. The provision of said act "shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside" has been construed by this court in numerous cases.

One of the leading cases involving this question is *In re Albert Heff*, 197 U. S. 488, 49 L. Ed. 848, wherein this court discharged petitioner from imprisonment under a conviction in the United States District Court for the District of Kansas because of a lack of jurisdiction. This case held that Section 6 of the General Allotment Act, 25 U. S. C. A. 349, had the effect of taking away the federal jurisdiction and subjecting the Indians to the jurisdiction of the state court. After discussing various decisions upon the question, the opinion concludes:

> "But it is unnecessary to pursue this discussion further. We are of the opinion that, when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of, and requires him to be subject to, the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control, thus created, cannot be set aside at the instance of the government without the consent of the individual Indian and the state, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indians are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

Eugene Sol Louie v. *United States*, 274 Fed. 47, was a case wherein Louie, a Coeur d'Alene Indian, was tried,

convicted and sentenced in the District Court of Idaho for the murder of another Coeur d'Alene Indian, within the limits of the Coeur d'Alene Indian Reservation in Idaho. Louie held a patent in fee to certain lands in the Coeur d'Alene Reservation, issued to him under an act amendatory to Section 6, of the act of February 8, 1887, the General Allotment Act.

In reversing the lower court and sending the case back with instructions to discharge Louie, the Circuit Court of Appeals, among other things, said:

> "Inasmuch as patent was issued under the Act of May 8, 1906, amending section 6 of the Act of February 8, 1887 we think that Louie as an allottee became subject to the laws, civil and criminal, of the state in which he resided.
>
> "The fact that the land was situate within the limits or boundaries of an Indian reservation is immaterial, because the allottee of the fee-simple patent was expressly declared to be subject to the laws of the state within which the land is situated.
>
> * * *
>
> "At once we find a clear distinction between Celestine's Case and Louie's, in that the terms of the statute under which patent to Louie issued have made him 'subject to the laws, both civil and criminal, of the state or territory' in which he resides, whereas no such terms are found in the Celestine Case. Congress by its legislation has therefore, in a sense, abandoned its guardianship of Louie and has left him subject to all the privileges and burdens of one sui juris."

In *United States* v. *Kiya*, 126 Fed. 879, the defendant, a full-blooded Indian, was charged in the indictment with

the crime of rape upon the person of a full-blooded Indian girl, in the Devil's Lake Indian Reservation in North Dakota. A plea to the jurisdiction of the court was sustained.

In *Ex parte Savage*, 158 Fed. 205, petitioner was denied release in habeas corpus proceedings upon the ground that the judgment of the District Court of Oregon was conclusive on the question of jurisdiction and that the question could not be raised in a habeas corpus proceedings. However, Judge Pollock in the opinion discussed the question raised in this case. The first paragraph of the syllabus in said case is as follows:

> "Where lands have been allotted to Indians in severalty, as authorized by Act Cong. Feb. 8, 1887, c. 119, 24 Stat. 388, the Indians cease to be wards of the government, and become citizens of the United States and of the state in which they reside, and are therefore amenable to the criminal laws of the state and triable in the state, and not in the federal courts, unless the offense charged was committed within territory over which the United States has reserved the exclusive jurisdiction to its courts."

United States v. *Hall*, 171 Fed. 214, held that where an Indian Reservation had been broken up and a large part of it owned in trust by allottees or white men, who had obtained title from the allottee's heirs at law, such allottees became citizens of the state, and were not therefore subject to prosecution in the federal courts for carrying ardent spirits into the reservation in violation of Act of Congress, the regulation of the liquor traffic being within the exclusive jurisdiction of the state.

To the same effect has been the ruling of state courts. See *State* v. *Lott*, 21 Idaho 646, 123 Pac. 491; *In re Now-*

Ge-Zhuck, 69 Kan. 410, 76 Pac. 877; *State* v. *Smokalem*, 37 Wash. 91, 79 Pac. 603.

Counsel for petitioner cites two Nebraska cases wherein he states that the Supreme Court of Nebraska did not construe the Federal Penal Code as providing that all Indians committing a crime within or without the Indian Reservation might be subject to the jurisdiction of the state courts. So far as *Ex parte Cross*, 20 Neb. 417, 30 N. W. 428, is concerned, it is a sufficient answer to call the court's attention to the fact that this case was decided at the July term of the court in 1886, which was prior to the time that the General Allotment Act, 25 U. S. C. A. 349, was enacted.

Kitto v. *State*, 98 Neb. 164, 152 N. W. 380, involved the crime of assault by defendant and the court held that the crime not being one of those over which the federal court had retained jurisdiction it was within the jurisdiction of the courts of the state.

The authorities are in accord and reason and justice suggest that since petitioner is given equal protection under the laws of the State of Nebraska he is also subject to prosecution under the state laws for violation thereof.

Point E.

The Ruling of a State Court That a Habeas Corpus Proceedings on the Merits is Conclusive in the Matter Therein Contained, and that a Second Petition for Habeas Corpus, Based Upon the Same Reason and Facts, is Res Judicata as to the Second Petition Does

Not Violate the Due Process Clause of the Fourteenth Amendment.

Counsel for petitioner criticizes the Supreme Court of the State of Nebraska for holding in *Williams* v. *Olson*, 144 Neb. —, 16 N. W. (2d) 178, that the doctrine of res judicata may be applicable in cases of habeas corpus where there has been a hearing upon the merits in a former action and it affirmatively appears that a second petition is based upon the same reasons and facts. The syllabus of the court in said case provides as follows:

> "The denial of an application for and refusal to allow a writ of habeas corpus by the district court is a final order, affecting a substantial right made in a special proceeding which, in effect, terminates the action. Such final order is reviewable on appeal to this court.
>
> "The principle of res judicata applies in cases of habeas corpus where there has been a hearing upon the merits in a former action of the same kind, and where, in a second petition filed for a writ of habeas corpus, it affirmatively appears that such petition is based upon the same reasons and facts and does not contain a new state of facts different from that which existed at the time the first judgment was rendered.
>
> "The final adjudication in a habeas corpus proceeding is conclusive in the matters there determined, as against a subsequent application."

That the application of the principle of res judicata is not stated as a broad, general rule without limitations is fully disclosed by the opinion of the court, wherein they quote from a previous Nebraska decision as follows:

> "In State ex rel. Flippin v. Sievers, 102 Neb. 611, 168 N. W. 99, this court held: 'The principle of res

> judicata does not apply in cases of habeas corpus to a judgment discharging the prisoner, when such previous discharge was not upon the merits, * * * or where a new state of facts, warranting his restraint, is shown to exist, different from that which existed at the time the first judgment was rendered.'"

The court made the express finding that the petition therein was based upon the same statement of facts and reasons as were contained in the prior application and stated as follows:

> "An examination of the petition in the instant case discloses it affirmatively appears that the contention in the former proceeding was that the judgment of the sentencing court was void, setting forth the reasons. The same conditions, based upon the same reasons and facts, are made in the petition before the court in the instant case. Due to the conclusiveness of the former judgment and the application of the doctrine of res judicata, the merits of this controversy, having been once determined in a former action, as hereinbefore explained, are not for review in this court."

The Supreme Court of Nebraska has held in *Tail* v. *Olson*, 144 Neb. —, 14 N. W. (2d) 840, that the right to appeal exists in habeas corpus proceedings. In the opinion, it is stated:

> "The constitutionality and statutory right of appeal in habeas corpus proceedings is now given in most states, and it operates as a substitute for successive applications from court to court, or judge to judge, which the prisoner had a right to make at common law, in case his application was refused. Church, Habeas Corpus, 2d Ed., 590, sec. 389 b.

> Such successive applications are not appeals since each court and judge thereof exercises a primary jurisdiction. That procedure was always attended by some danger of injustice and hazard of hardship or expense to both the prisoner and the state. As a result legislative bodies including our own have substituted the right of appeal for the successive applications permissible at common law. Church, Habeas Corpus, 2d Ed. 601, sec. 389 g. In this connection, it is to be noted that the statute, Comp. St. 1929, sec. 29-2801, provides that the application shall be made to any one of the judges of the district court, and this court has held that 'An application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined.' Gillard v. Clark, 105 Neb. 84, 179 N. W. 396, 397."

The correctness of the statement in the above quotation that in permitting successive applications "that procedure was always attended by some danger of injustice and hazard of hardship or expense to both the prisoner or the state" has become very apparent not only in the State of Nebraska, but throughout the entire nation. During the last few years, a large number of prisoners from the Nebraska State Penitentiary have proceeded to file petitions for habeas corpus in the district courts of the state and the United States District Courts, as well as making applications to file in the Circuit Court of Appeals, directly in the Supreme Court of the State of Nebraska, and several applications have been made to file original actions in this court. Some of these prisoners have filed ten or more successive applications in spite of the fact that full hearings have been granted in numerous cases and in none of these cases when a hearing has been granted has the allegation of wrongful detention

been established. These facts are well known to the Supreme Court of Nebraska and are matters of which they may take judicial notice. We believe that this court also may take judicial notice of the applications for certiorari made to this court, as well as the applications made to file original petitions in habeas corpus before this court.

We also believe that this court may also take judicial notice of the fact that although petitioners have represented themselves in these actions the pleadings and briefs in all of these cases are so similarly phrased, the only changes being that of names, dates, etc., that this would suggest that the petitions and briefs are all written by one man, and as set forth in the present petition, as well as in many others, petitioner has the assistance of a fellow prisoner.

We make these statements because we believe that justice demands that even in habeas corpus proceedings the courts must consider the rights of the state and of society, as well as the rights of the petitioner. We do not intend to state that the rules should be the hard and fast rules which may govern in other cases, but are willing to concede that every precaution should be taken to prevent the wrongful detention of any person, but if orderly government is to function there must be some limitation even in these cases.

Where a petitioner has been granted a hearing on the merits of his case and a determination thereof is made by a court of competent jurisdiction, and where the right of an appeal to the highest court of the state is authorized, we can find no sound basis for the contention that, applying the principle of res judicata when a second petition is presented, stating the same facts and the same

reasons, constitutes a denial of any of the fundamental rights of the petitioner. The state and society are entitled to this much protection from the courts.

CONCLUSION.

Petitioner has set forth numerous other grounds which he contends make his detention wrongful, such as the fact that he was not indicted by a grand jury, that he was not tried before a jury, and that he was given an indeterminate sentence although he had previously been convicted of a felony. These matters, however, have not been presented in the brief of counsel, and, since they are so completely without merit, we do not consider it necessary to discuss them here.

We submit that the petition filed herein fails to state any facts which disclose that petitioner is being wrongfully detained by the warden of the Nebraska State Penitentiary, but that to the contrary the petition discloses that he is lawfully being held as a prisoner in said penitentiary. For these reasons, and for all of the reasons set forth in this brief, the action of the Supreme Court of Nebraska in affirming the District Court of Lancaster County, Nebraska, herein should be affirmed and the petition for a writ of habeas corpus dismissed.

Respectfully submitted,
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H. EMERSON KOKJER,
Deputy Attorney General,

ROBERT A. NELSON,
Assistant Attorney General,
For Respondent.

APPENDIX.

14 Statutes at Large 671 contains the treaty with the Winnebago Indians of March 8, 1865, which is as follows:

"ANDREW JOHNSON,

"President of the United States of America,

"To all and singular to whom these presents shall come, Greeting:

"Whereas a Treaty was made and concluded at the city of Washington, in the District of Columbia, on the eighth day of March, in the year of our Lord one thousand eight hundred and sixty-five, by and between William P. Dole, Clark W. Thompson, and St. A. D. Balcombe, Commissioners, on the part of the United States, and Little Hill, Little Dacoria, Whirling Thunder, Young Prophet, Good Thunder, Young Crane, and White Breast, Chiefs of the Winnebago Tribe of Indians, on the part of said tribe of Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to-wit:—

"ARTICLES OF TREATY made and concluded at Washington D. C., between the United States of America, by their Commissioners, Wm. P. Dole, C. W. Thompson, and St. A. D. Balcombe, and the Winnebago Tribe of Indians, by their chiefs Little Hill, Little Decoria, Whirling Thunder, Young Prophet, Good Thunder, and White Breast, on the 8th day of March, 1865.

"ARTICLE I. The Winnebago tribe of Indians hereby cede, sell, and convey to the United States all their right, title, and interest in and to their present reservation in the Territory of Dakota, at Usher's Landing, on the Missouri river, the metes and bounds whereof being on file in the Indian Department.

"ARTICLE II. In consideration of the foregoing cession, and the valuable improvements thereon, the United States agree to set apart for the occupation and future home of the Winnebago Indians, forever, all that certain tract or parcel of land ceded to the United States by the Omaha tribe of Indians on the sixth day of March, A. D. 1865, situated in the Territory of Nebraska, and described as follows, viz; Commencing at a point on the Missouri river four miles due south from the north boundary line of said reservation; thence west ten miles; thence south four miles; thence west to the western boundary line of the reservation; thence north to the northern boundary line; thence east to the Missouri river; and thence south along the river to the place of beginning.

"ARTICLE III. In further consideration of the foregoing cession, and in order that the Winnebagos may be as well situated as they were when they were moved from Minnesota, the United States agree to erect on their reservation, hereby set apart, a good steam saw-mill with a grist-mill attached, and to break and fence one hundred acres of land for each band, and supply them with seed, to sow and plant the same, and shall furnish them with two thousand dollars' worth of guns, sixty horses, one hundred cows, twenty yoke of oxen and wagons, two chains each, and five hundred dollars' worth of agricultural implements, in addition to those on the reserve hereby ceded.

"ARTICLE IV. The United States further agree to erect on said reservation an agency building, school-house, warehouse, and suitable buildings for the physician, interpreter, miller, engineer, carpenter, and blacksmith, and a house 18 by 24 feet, one and a half story high, well shingled and substantially finished, for each chief.

"ARTICLE V. The United States also stipulate and agree to remove the Winnebago Tribe of Indians

and their property to their new home, and to subsist the tribe one year after their arrival there.

"In testimony whereof, the said Wm. P. Dole, Clark W. Thompson, and St. A. D. Balcombe, Commissioners as aforesaid, and the undersigned chiefs and delegates of the Winnebago Tribe of Indians, have hereunto set their hands and seals, at the place and on the day hereinbefore written."

This treaty was accepted by the Senate of the United States with an amendment to Article III allowing the Indians four hundred horses instead of sixty.

25 U. S. C. A. 349, a part of the General Allotment Act passed February 8, 1887, and amended May 8, 1906, provides as follows:

"At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee simple patents all allottees to whom trust patents shall be

issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of sections 331 to 334, inclusive, 336, 341, 348 to 350, inclusive, and 381 shall not extend to any Indians in the former Indian Territory."

SUPREME COURT OF THE UNITED STATES.

No. 391.—October Term, 1944.

Richard Rice, Petitioner, *vs.* Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska.	On Writ of Certiorari to the Supreme Court of Nebraska.

[April 23, 1945.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner, an Indian, without benefit of counsel pleaded guilty to a charge of burglary in the District Court of Thurston County, Nebraska, and was sentenced to from one to seven years. He petitioned another state District Court for a writ of habeas corpus seeking release from the penitentiary on the grounds, among others,[1] that he had been deprived of his constitutional right of counsel, and that the state court lacked jurisdiction. He alleged that he was ignorant of the law, and that in preparing his petition he had no one to help him except a fellow inmate. Petitioner did not challenge the facts stated in the judgment entry, i. e., that, in the burglary proceedings, he was arraigned and pleaded guilty, that the burglary statute was read to him, and that he then reiterated his plea. He challenged the validity of the judgment, however, on the ground that, in violation of the Fourteenth Amendment, he had been deprived of due process of law in that the trial court failed to advise him of his constitutional rights to counsel and to call witnesses. Petitioner further alleged that he had not waived those rights by word or action. Finally, the petition alleged that the conviction was void because the alleged crime was committed on an Indian Reservation which was exclusively within federal jurisdiction.

The petition was dismissed by the state District Court, for lack of merit, without an answer, and without a hearing. Petitioner then moved to set aside the dismissal, repeating his allegations, and

[1] Allegations of the petition charging that the petitioner's imprisonment was illegal under state laws need not be set out, since those questions have been finally adjudicated by the state Supreme Court and are not subject to review here. Smith v. O'Grady, 312 U. S. 329, 330.

requesting the appointment of counsel to assist him. The motion was denied, and petitioner, again acting in his own behalf, appealed to the Supreme Court of Nebraska. That court, without requiring an answer, affirmed the District Court. — Neb. —. Because important constitutional rights are involved, we granted certiorari and oppointed counsel to represent petitioner. — U. S. —.

In affirming, the Nebraska Supreme Court stated that "It is not necessary that there be a formal waiver; and a waiver will ordinarily be implied where accused appears without counsel and fails to request that counsel be assigned to him, particularly where accused voluntarily pleads guilty." It is apparent that the court's affirmance did not rest on its statement that a plea of guilty "ordinarily implied" a waiver of the right to counsel, but upon a holding that such a plea "absolutely" and finally waives that right.[2] This is inconsistent with our interpretation of the scope of the Fourteenth Amendment.

Whatever inference of waiver could be drawn from the petitioner's plea of guilty is adequately answered by the uncontroverted statement in his petition that he did not waive the right either by word or action. This denial of waiver squarely raised a question of fact. The state Supreme Court resolved this disputed fact by drawing a conclusive implication from the petitioner's plea of guilty. This is the equivalent of a holding that one who voluntarily pleads guilty without the benefit of counsel has thereby competently waived his constitutional right to counsel, even though he may have sorely needed and been unable to obtain legal aid. A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary. It is enough that a defendant charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandingly waive counsel.[3] Whether all these conditions exist

[2] In discussing allegations of the petition other than the one relating to appointment of counsel, the state Supreme Court also quoted with approval a statement that "A plea of guilty admits all facts sufficiently pleaded, . . . operates as a waiver of any defense, and . . . with it, of course, the constitutional guarantees with the respect to the conduct of criminal prosecutions." The court therefore said that since the record affirmatively showed that the defendant had pleaded guilty, this absolutely waives this and all other preliminary steps in connection therewith, ..."

[3] Williams v. Kaiser, 323 U. S. 471; Tomkins v. Missouri, 323 U. S. 485; House v. Mayo, No. 921, decided February 5, 1945.

is a matter which must be determined by evidence where the facts are in dispute.

The petitioner's need for legal counsel in this case is strikingly emphasized by the allegation in his habeas corpus petition that the offense for which the state court convicted him was committed on a government Indian Reservation "without and beyond the jurisdiction of the Court." This raises an involved question of federal jurisdiction, posing a problem that is obviously beyond the capacity of even an intelligent and educated layman, and which clearly demands the counsel of experience and skill.

The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history. See *Worcester* v. *Georgia*, 6 Pet. 515; 1 Stat. 469; 4 Stat. 729. In the light of this historical background Congress in 1885 passed a comprehensive Act, 23 Stat. 362, 385, in order to fulfill "treaty stipulations with various Indian Tribes", specifically including the Winnebagoes, of which tribe the petitioner alleges he is a member. The last section of that Act subjects Indians who commit certain crimes, including burglary, to trial and punishment. The language there used to accomplish this purpose is that "all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." 23 Stat. 385. This section now appears as Section 548 in Title 18, of the United States Code and the state Supreme Court has ruled that it gives Nebraska authority to try the petitioner. This construction of the section is not in accord with that heretofore given it by the Courts of Nebraska and other courts.[4] In argument before us, Nebraska does not rely on the state Supreme Court's construction of 18 U. S. C. 548. Instead it argues that petitioner's allegation that the crime was committed on an Indian Reservation is false, and that the state Supreme Court was required to take judicial knowledge of its falsity. It admits, however, that Thurston County, where the burglary was allegedly committed, is included within the original statutory boundaries of a

[4] Ex parte Cross, 20 Neb. 417, cf. Kitto v. State, 98 Neb. 164; State v. Campbell, 53 Minn. 354; People v. Daly, 212 N. Y. 183; United States v. Kagama, 118 U. S. 375.

federally created Indian Reservation, 14 Stat. 676, 14 Stat. 371, and that the village of Winnebago, where the alleged offense was committed, is located within the boundaries of the Winnebago Reservation. The village of Winnebago, it insists, has ceased to be a part of the Reservation because all the Indians have been given the full benefits of citizenship by Nebraska and because Winnebago is incorporated under the laws of Nebraska and is located entirely upon land which has been patented in fee. The facts upon which this contention rests are said to be those of which Nebraska Courts can take judicial knowledge. With these facts thus established, it is said that jurisdiction of Nebraska over this offense is conferred by Section 6 of the General Allotment Act passed in 1887, 24 Stat. 390, as amended, 34 Stat. 182. Assuming that all the facts urged by the State are correct, and that these Indian lands have been disposed of under this latter statute, the State finds support for its contention in this Court's interpretation of that Act in *In re Albert Heff*, 197 U. S. 488. But later cases have cast considerable doubt on what was said in the *Heff* decision. *United States* v. *Celestine*, 215 U. S. 278, 290-291; *Hallowell* v. *United States*, 221 U. S. 317, 323; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 314; *Donnelly* v. *United States*, 228 U. S. 243, 269-272; *United States* v. *Chavez*, 290 U. S. 357; *United States* v. *McGowan*, 302 U. S. 535, 539.

All of these questions concerning the power of the State Courts to try this Indian petitioner for burglary indicate the complexities of the problem he would have found had he attempted to defend himself on this ground. And a decision by the State Court that it had jurisdiction might or might not have finally determined the issue. Cf. *Toy Toy* v. *Hopkins*, 212 U. S. 542, 549, and *Bowen* v. *Johnston*, 306 U. S. 19.

We conclude that the petitioner is entitled to a hearing on his allegations that he did not, in the burglary proceedings, waive his constitutional right to have the benefit of counsel.

It has been suggested that even if the court below erred in holding that a plea of guilty is a conclusive waiver of the right to counsel, its judgment might be sustained on the ground that habeas corpus was not the proper remedy, or because the allegations of the petition lack sufficient definiteness. The very fact that the court considered the petition on its merits gives rise to a strong, if not conclusive, inference that the petition satisfied the state's procedural requirements in all respects. By treating this clumsily drawn petition with liberality, instead of dismissing it

because of a failure to comply with the precise niceties of technical procedure, the state Supreme Court acted in accordance with its traditional solicitude for the writ.[5] And this treatment is in line with federal practice. "A petition for *habeas corpus* ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice." *Holliday* v. *Johnston*, 313 U. S. 342, 350, 351.[6]

Since the State Court placed its judgment precisely on the absence of merit in the petition, we could not except by speculation, conclude that the petition failed to measure up to its procedural requirements.[7] For the reasons given, we hold that the allegations of the petition showed a prima facie violation of the petitioner's right to counsel.

Reversed.

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[5] "It must be conceded that the petition is not a skillfully drawn pleading, but as it was not attacked in the district court it must receive a liberal construction here. . . . Crocker made no appearance in the case, and the warrant was not set out in any of the pleadings. When attacked after judgment, the petition, though informal, must be held sufficient." Urban v. Brailey, 85 Nebraska Reports, 796, 798-99. "It has been held that the proper method of attacking the petition is by motion to quash the writ, and that insufficiency in the petition is waived unless that remedy be resorted to. (McGlennan v. Margowski, 90 Ind. 150.)" Nebraska Children's Home Society v. State, 57 Neb. 765, 769. See also Chase v. State, 93 Fla. 963; State *ex rel.* Chase v. Calvird, 324 Mo. 429; Stuart v. State, 36 Ariz. 28; State *ex rel.* Davis v. Hardie, 108 Fla. 133; Ex parte Tipton, 83 Cal. App. 742; Deaver v. State, 24 Ala. App. 377; McDowell v. Gould, 166 Ga. 670; Ex parte Tollison, 73 Okl. Cr. 38; People v. Cook County Super. Ct., 234 Ill. 186; Willis v. Bayles, 105 Ind. 363.

[6] See also Cochran v. Kansas, 316 U. S. 255; Bowen v. Johnston, 306 U. S. 19.

[7] See Smith v. O'Grady, *supra*; cf. United States v. Ju Toy, 198 U. S. 253, 261.

Mr. Justice FRANKFURTER, dissenting.

In view of the circumstances revealed by the record in this case and in the light of Nebraska's experience with petitions for *habeas corpus*, as laid before this Court by the Attorney General of Nebraska, the meager allegations of this petition for *habeas corpus* should preclude our attributing to the Supreme Court of Nebraska a disregard, in affirming a denial of the petition, of rights under the Constitution of the United States rather than a denial on allowable state grounds. Accordingly, I believe the judgment should be affirmed.

Mr. Justice ROBERTS and Mr. Justice JACKSON join in this view.